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IN AS PETITION OF ANTON J. VESELY UNDER THE INSOLVENT DEBTORS ACT

FRED H. MEYER, (Respondent),

Appellant.

APPEAL FROM COUNTY
COURT, COOK COUNTY.

1261 I.A. 637'

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Anton J. Vesely filed a petition for release under the Insolvent Debtors act, and from an order entered discharging the petitioner from the custody of the sheriff of Cook county, Fred H. Meyer, respondent, has appealed. The petitioner, Vesely, has filed neither an appearance nor a brief in this court.

Upon /hearing of the petition, the respondent, Keyer, introduced in evidence the amended declaration, verdict of the jury and judgment of the court in the case of Fred H. Meyer v. Anton J. Vesely, in the Superior court of Cook county. The amended declaration consists of two counts. Count one alleges that "on July 16, 1928, the defendant Anton Vesely with force and arms, etc. in the County aforesaid, assaulted the plaintiff, and with great force and violence drave a certain automobile which was then and there being driven, operated and was under the control of the said defendant, upon a public highway, within the Corporate limits of the village of Maywood, at a speed which was not reasonable and proper having regard to the traffic and use of the highway and at a speed exceeding fifteen miles per hour, which was then and there an unlawful act and in the doing of which, the said defendant drove his aforesaid automobile upon the plaintiff and thereby violently knocked the plaintiff down from his automobile, which he was then and there operating, upon the ground, whereby the plaintiff was then NUV 7 '60

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IMI PRITITION OF ANTON J. VERRLY

Appellant.

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THUO HET TO HOLKING THE CHERT THE COURT OF THE COURT.

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Upon meering of the petition, the respondent, Meyer, introd in evidence the amended declaration, variet of the jury judgment of the court in the case of Fred H. Meyer v. Anse Vesely, in the Superior court of Cook county. The amended dediton complete of two counts. Count one alleges that "on July 1923, the defendant Anton Vesely with force and arms, etc. in Sunty aforeasid, assaulted the plaintiff, and with great form widlence drawe a certain automobile which was then and therag driven, operated and was under the control of the said deffe, upon a public highway, within the Corporate limits of bus aldanouses you was notice page a to 'pooken to as aut prepring regard to the traffic and use of the highway and at abspeceding fifteen miles per hour, which was then and there and act and in the toing of which, the said defendent drove his aid automobile upon the plaintiff and thereby violently ment any an neity , all dome tue and appl anob literale commo and sperating, upon the ground, whereby the plaintiff was then

and there greatly hurt, bruised and wounded," etc. The second count alleges that on July 16, 1928, "the defendant Anton Vesely, with force and arms, etc. in the County aforesaid, assaulted the plaintiff and with great force and violence drove a certain automobile which was then and there being driven, operated and was under the control of the said defendant and was driven by him in a westerly direction on Madison Street, which is a public highway in the village of Maywood, to and against the automobile of the plaintiff, which was being driven by the said plaintiff in a southerly direction on 15th avenue, also being a public highway in the village of Maywood, County and State aforesaid, and that the said defendant failed to give the said plaintiff the right of way at the said intersection, which was then and there an unlawful act, and in the doing of which, the said defendant draye said automobile upon the plaintiff and his automobile, and thereby violently knocked the plaintiff down upon the ground; whereby the plaintiff was then and there greatly hurt, bruised and wounded." The declaration concludes as follows: "And other wrongs the defendant to the plaintiff then and there did, to the great damage of the plaintiff, and against the peace of the people of this State. Therefore the plaintiff says that he is injured, and has sustained damage to the amount of Five thousand dollars (\$5,000.00), and therefore he brings his suit, etc." To these counts the defendant filed a plea of not guilty. There was a trial before the court. with a jury, and a verdict returned finding the defendant guilty and assessing the plaintiff's damages at the sum of \$1,000. The defendant prayed an appeal but never perfected it. A capias was issued and the defendant taken into custody by the sheriff, and he thereupon filed in the County court the petition in question.

Count one, in substance, charges that the defendant (petitioner) committed an assault with an automobile upon the plaintiff, Fred H. Meyer (respondent), and that this assault was

and there greatly hurt, bruised and wounded," see The second vises V motes that as 1928, 1928, "the defendant Anton Veselv, with force and arms, etc. in the County oforcesid, manguited the olidonolus nich erech force and violende drove a certain sucomonde eds taken any has heteron anovirt mitted event has ment eaw dales course of the said defendent and was driven by him in a westerly direction on Medicon Street, which is a public highway in the village esw noths . This mist one to efficame such as and and the co. to move to being driven by the said plaintiff in a southerly direction on 18th avenue, also being a public bighway in the village of Maybood. County and the aterests, and that the end day beer that the states to day bee said plaintiff the right of ony at the said intergration, which was then and there an unlewful act, and it wise of the chief and which, elidometus oid bas arisainly sas noge sildemetus bies everb imphastob sheworn end nous nuch tridnial odd beroom givesleim gdered bas sherony the plaintiff was then and there greetly hert, brulesd and The declaration concludes as fellows: "And other wromen the defendant to the plaintiff then and there did, to the great demens etes olds to eleon out to energ and tentage has little out to beniefeus and bas absublat et se sans byen littatele ods sucloued damage to the smount of Plve thousand tollars (18,000,000), and thebastes and estance energy at ". ote , sine aid agains and explored filed a ples of not guilty. Bere see a trial before the court, with a dury, and a verdiet returned fineing the defendant gailty off .000.18 to ease off to comment a "thismising off anianous has ass sains A . Il beforered reven but lasque me beyond desheolab on has "Tivede one ye violane eint medal imphesteb one beneal thereupon filed in the County court the petition in question.

Count one, in substance, charges that the defendant (patitioner) committee an account with an automobile upon the plaintiff, Fred H. Meyer (respondent), and that this assent was

committed while the defendant was in the commission of another unlawful act. Count two makes a like charge. The declaration. in form, is such as is used in an action of trespass for an assault, etc. The driver of an automobile may be guilty of an asseult with a desely weapon. (See The People v. Benson, 321 Ill. 605, 611.) It was held in Fetz v. The Feople, 239 Ill. 250, 251-3, that where a count charges that the defendant with force and arms assaulted the plaintiff and with great force and violence dreve his automobile to and against her, against the peace of the Feople of the State of Illinois, such a charge implies malice. It hes been frequently held that in an action of trespans for an assault and bettery, melice is the gist of the action, and a defendant, where a judgment has been rendered against him in such an action, and he is held in custody under a capies ad satisfaciendum, is not entitled to a discharge from imprisonment under the Insolvent lebtors act. (In re Murphy, 109 Ill. 31; In re Mullin. 118 Ill. 551; The People y. Walker, 286 Ill. 541, 543. See also In the Matter of John Bobzin, 220 Ill. App. 470, and cause cited therein.) It would fellow, of course, from the above rule, that aslice would be the gist of an action where the charge was an assault of a more serious nature than assault and battery.

The County court erred in ordering the petitioner, Vesely, released from oustody, and the judgment of that court is reversed and the cause is remanded with directions that the petitioner, Vesely, be returned to the oustody of the sheriff.

REVERSED AND REMANDED WITH DIRECTIONS.
Gridley and Kerner, JJ., concur.

validate by sufaciones and all any Destroyed any edite intrinses Chiefed only County because will be conserved the conference. no wit manquers to makes no mk bear al as more al amor al as he willies of the allegantee as he would all the attenues all the amount of short off and amount there a give the one 605, 612.) It was held to Fetz we The Feezle. 239 111. 250, 651. Es that where a court charges that the cereadant with force and somelety has egget deern still and Thinking and bediences were derive ble sustandile to and equine her, spainet the page of the People of test State of Illinois, such a charge inglies malice. It African no to's manyout to molice on al toul blad plicement mand and end bottery, unlike is the give of the oction, and a defendant, where a judgment has been resileded against him in auch un schleu, and he andition ope at ambusing this ha anique a robus sporters at bied at of a classic from the comment with the free from the care and the care often and the till all the telling of the till all and the telling at the telling and the telling and the telling at the telli nelacte mist the tolder out at onto not wind, abit will not applied at To average begons in (automore beauty beauty were not will see no to Jely add ad binos cultos butt gaint evens att met gegraet artine ancier oron a lo timere me, and exists and evolv seites syrudian ins likewis smir

The Jounty court erred in ordering the politioner, Venity, released From analody, and the judgment of that some is remanded with directions that the petitioner, Venely, be returned to the autody of the phariff.

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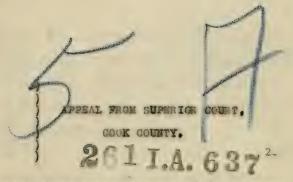
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INGRE ANDRESSN.
Appellee.

V.

JACOB KLEIN, Appellant.



MR. PRINCIPING JUSTICE SCANLAR DELIVERED THE OPINION OF THE COURT.

Inger Andersen such Jacob Elein in an action in case.

There was a trial before the court, with a jury, and a verdict returned finding defendant sailty and assessing plaintiff's damages in the sum of \$8,000. Judgment was entered on the verdict and defendant has appealed. The suit was originally commenced against Jacob Elein and Lillian Elein, but at the close of all the evidence plaintiff dismissed as to Lillian Elein.

Plaintiff such to recover damages for personal injuries custained by reason of her falling through a glass skylight on the roof of a one-story building known as No. 4546 Cottage Grove avenue. Chicago. Defendant was engaged in the plumbing and heating supply business, with offices at 4548 Cottage Grove avenue. This was a two-story building on the west side of the street and was owned by defendant. He used the ground floor for his business and on the second floor there were a front and a rear apartment, separated by a parch about twenty feet across. Directly to the north of this building was a one-story building, which was used by defendant as a storeroom for supplies. This building was covered with tar paper and sand and was about 150 feet in length. Toward the rear of this roof was a skylight, between three and one-half and four foet square, which was elevated above the level of the roof

Jacon marin.

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Inger inderson sund Jacob Klein in an action in onne.

The control in the superiod. The suit was originally the against Jacob Klein Kiein, but at the close of all the

nal-count loosevery but expense arresport as over Philadelphia. out no implifies analy a dissence thilles and to mener we include on the roof of a see-story bullding known as Mos 4546 dottone Green avenue, refigure introd has pulsaring and al beganes our suchaster Sectionary with affice on electrical first contract with access ud banes any has doorse red to oble dean oil see mibiled green-out odd no bue esenteed aid not need humany and bear off . in bustos minuse these threat ages to front out by your continued, arguments . green san't romes to note do on a ve lo siron od of viscoria dandered on one some a bit (ou, will be one and the collection and the collection alias a decreron for augilion. This building too known as No. 4848 data deverse Grove procue. The reof of this building was covered with self brown? and seel al deel bell duode and been been two recast and has blad-one bus veril acres of shallyde a sew boar slad to reer Trox said to level and avode chewels one delig general of the tro?

between four and seven inches. Two or three wires used as clotheslines were stretched from the porch between the two apartments on the second floor of No. 4548 across the roofs of Nos. 4548 and 4546 and to the south side of the building immediately to the north of No. 4546. One of these wires or clotheslines passed "within a foot or so" of the skylight. In December, 1925, defendant leased the front second floor appriment at No. 4548 to plaintiff under an oral leage. Flaintiff testified that at the time she rented the apartment defendant told her that there was no laundry in the basement and that the tenants washed their elethes in the kitchen, and that defendant pointed to the wires or clotheplines that stretched across the roofs of the two buildings and told her that the other tenants used these wires and that she might hang her washing on them, as the property (No. 4546) belonged to him. Plaintiff testified that between six and seven o'clock a. m., September 18, 1926, she was hanging her wash on the line; that just before the accident happened she was about a foot or so from the skylight with her back to it and she was hanging the clothes; that her foot sank into the roof and she fell beckward. overbalanced, and fell through the skylight and austained the injuries for which she sued. No one save plaintiff testified as to the manner of the accident.

Defendant alleges and argues a number of points in support of his contention that the order should be reversed and the cause remanded. In the view that we have taken of this appeal we deem it necessary to notice one only. Defendant contends that the great weight of the evidence shows that plaintiff was guilty of contributory negligence that directly contributed to the injuries in question. Ifter a careful and painetaking examination of the evidence bearing upon this contention we have reached the conclusion that it is a meritorious one. The fifth count of the declaration alleged that the skylight was covered with tar paper and was thereby hidden as

-sadials and been some or three wires and an electron to the cold and lines sers atreteined from the porch between the two Charlanets on the ground theor of He. 4543 cerose the reals of Ros. 4543 and 4548 and . Ball . of to diver wit of yieldsheam! amidive out to obje diver sat of he "ow we feet a abdite" become availandfulls we arely most? he sail floor of remont of No. 4548 to plaintiff under am oral leage. Fininginabnoteb inendrogs odd boiner and smid and to doll beillined this beld her that there was no laundry in the basement and that the tonants of negative decimates that the meantificate and at collect a test bedance out and to whom and annuar buildents that anniholdents to well and has wolly meant from adveced traffe and dots and hier has appliabled that who might hear wooking on thom, and the property (No. 4044) serves he has all expended board block board belowed by the seal and begunded office me me, bytember 18, 1884, she wanting bor was a color line; that funt before the encious deposes the mee about a fool or so from the orgilant with her b. on to it and she may hanging the becomes diet als ten beer all sink dam runt and dell products agirshat out heatesous has phallyde ado disould fiel but becauled avo for which alse enod. He one ever plaintiff heghlifod on to the . Jestlana adi is remana

and of the control of the control of this appeal we does it made control of this appeal we does it made control of the control of contributions weight of the evidence shows that similarly was sailty of contributions of the contributions of the decision allowed that court the contributions at the contribution of the decision allowed that the skylight "was experted with the paper and was thereby hidden on

as not to be perceptible as a skylight, and plaintiff had no knowledge that there was or ever had been a skylight," and it was the theory of fact of plaintiff that the skylight was covered with tar paper and thereby hidden, but she failed to prove that the skylight was covered with ter paper. The testified that there was ter paper and send on the roof but that she could not say shother the skylight "was covered with tar paper or dirt," that she "never examined it;" that she did not know that the skylight was covered with anything; that she never saw any glass in it "because it is black." Mrs. Thempson, a witness for plaintiff, testified that "there was glass across the skylight." Kennedy, also a witness for plaintiff, testified that the roof was "a tar paper roof" and that there was a skylight on the roof that "was built up about six inches above the level of the roof," but that he never examined the skylight to determine if it was covered. The evidence shows very clearly that the skylight was made of "fire-resisting glass, wire glass," and that it was not covered with ter paper. It was built to furnish light to the store space below it. The theory of fact of plaintiff was that there was no fence or guard around the skylight, but after examining all the evidence bearing upon that subject we are satisfied that there was a fence around the skylight, between eighteen and twenty-four inches high, which was set upon posts. A lieutenant in the Chicago Fire Department, who, with his company, was called to the place in question immediately after the accident occurred, testified that the skylight was made of glass and that there was a fence around it, and that in order to look down through the skylight to see plaintiff he had to "stoop down and look over" the fence. He also testified that there were two or three panes of glass broken in the sky-Plaintiff testified that she did not know whether she broke any glass when she fell through the skylight. However, her principal witness, Mrs. Thompson, testified that there as glass across the

are had thinkindy have adapting to an addition on an an and the are had been as " " mare let leas " heighlight in done had not very you any sends had regardened CANADA SHAREN AND RESIDENCE AND LAND TO DESIGN TO SHARE BE STORED AND tar paper and theseby hidden, but she failed to prove that the chy-Make man record of the paper. The brackfried that there and have -, and tradition have then have only fact that that on home and rappe novem" and that ", take no negat and data become one" thatlyde bureyes our santifule and sent word for his and this "it's beelmore at it accessed it at seals was one rower ads init ; antaly so this pair to Hitch a Witching to Assent in a amount of the Published "there was gloss overes the skylight" "fernedy, also o witness for And the "Laur topes tot a" and hear this sout bellifest allegated there were a skylight on the reef that "ene built up about ain inches should see evel of the root," but that he never emained the shullight to determine if it was covered. The switches chows very clearly that his savilable was made of "fire-reclasing glace, with miner." delenge to salt to man st . regar to diffe between for new il Sadd bace light to the group space the short of the light of the li was that there was no fence or guard around the skylight, but after examining all the evidence bearing upon that subject we are delighted that there were a fonce amound the phylicit, between vighteen and the state of the language with the case of the language of the the Chicago Fire Department, whe, with his comment, was colled to the brillians, torange of the contract and the contract and section of the contract and the con bursto come a man oreda dand dess manis to come and bellevin aid and tiff he had to "ecopy donn and lank over" the tance. He also weeke that that there are two or three genes of these water is desions of the restiff restified the als als near whether the paint witness, Bry. Tonorma, traduited that more was given never the "there was just glass setting around one side, one end, and there was a big open space where Mrs. Inderson went through." Plaintiff testified that for about nine or ten months before the accident she hung out her washing about once or twice a week on the lines in question and that just before the accident she was standing about a foot or so from the skylight, with her back to it, and was hanging the clothes; that "my foot sank into the roof and I fell backwards - overbalanced." "Q. That do you mean, 'It sank in the roof'? A. The tar paper or board or whatever it was - I went into it and I over-balanced. ". There did you fall? A. I fell through the skylight."

Plaintiff's case, as alleged in the declaration, proceeded upon the theory that defendant was the owner of the premises in question and that he permitted the roof surrounding the skylight to become and remain in a dangerous and dilapidated condition, and that he had knowledge of such condition, or by the exercise of ressonable diligence could have had knowledge of it, and that plaintiff, while in the exercise of due care, by reason of the defective roof, tripped and fell upon and against said skylight. Plaintiff undertook to prove that at the time of the accident defendant owned the property at No. 4846, but the evidence clearly shows that he did not. As we understand the theory of fact of plaintiff, her "foot sank into the roof" and she "fell backward, overbalanced " " through the skylight." Plaintiff testified that before the accident she never noticed engthing wrong with the roof; "there was nothing wrong with the roof as far as I know: I dien't see anything wrong." The witness Kennedy testified that he did not know what the condition of the roof was prior to the accident. Mrs. Thompson testified as follows: "Mr. Lawrence (attorney for defendant): Q. hat was the

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ing the cisthest that "a fost sunk into the roof and I fell back
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went into it and I aver-balances. " " " here did you fall? A. I

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Mr. Baird (attorney for plaintiff): Them? Mr. Lawrence: Before
the accident. A. Yes. Q. Looked all right? A. It looked
all right. That's all I know." The great seight of the evidence
proves that the roof was in good condition at the time of the
accident.

The condition of the roof and skylight was open and obvious to plaintiff and she was thoroughly familiar with the place in question. The great preparement of the evidence supports the theory of defendant that plaintiff, while stending with her back to the skylight and preoccupied in hanging out her washing, forgot her close position to the skylight and stepped backward, and that in so doing she struck against the fence surrounding the skylight, overbalanced, and fell through the skylight.

The judgment of the Superior court of Gook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley and Kerner, JJ., concur.

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tridler and Robner if a concur.

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RIGHARD J. LAFFRY, Appollee,

V.

city of chicago, a Municipal Corporation, Appellant.



MR. PRESIDING JUSTICE SCANLAR FELIVERED THE OPINION OF THE COURT.

Richard J. Laffey, plaintiff, sued the City of Chicago, a municipal corporation, in an action in case. There was a trial before the court, with a jury, and a verdict returned finding defendant guilty and assensing plaintiff's damages at the sum of \$3,500. Judgment was entered on the verdict and defendant has appealed.

and property damage sustained by him in an accident that occurred May 18, 1928, on Morgan street, between 74th and 75th atreets, near an overhead railroad viaduct. The accident was caused by a large hole in the street near the viaduct, which caused the truck plaintiff was driving to be thrown against one of the pillars of the viaduct. Plaintiff was hurled from his seat on the truck against a pillar of the viaduct, and the truck was practically demolished and he was seriously injured. The street near the locus in que was poorly lighted and the accident occurred at night when it was quite dark. The defect in the street had continued for a long time.

Defendant contends that "the declaration and each and every count thereof, is inoufficient to support the judgment;" that "the first count of the declaration fails to state a cause of action," and "the second count is based on property damage only, and is insufficient to sustain an award for personal injuries

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RICHARD J. LAWFOY,

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every count thereof, is insufficient to support the judgment;"
that "the first count of the declaration fails to state a value of
thete "the first count of the declaration fails to state a value of
action," and "the second count is based on property damage only,
and is insufficient to cantain an avera for personal injuries

suffered by the plaintiff. Defendant argues that count one of the declaration is fatally defective. Plaintiff contends that count one states a cause of action but defectively and is therefore good after verdict. It is a sufficient answer to defendant's contention to state that 1f it be conceded that the first wount is insufficient to support a recovery, the second count states a good cause of action and is sufficient to support the verdict and judgment. The contention of defendent that the second count is based on property damage only is without the slightest merit. The pleader, in drafting that count, adopted peragraphs one, two and four of the first count as paragraphs one, two and four of the second count. The fourth paragraph of count one alleges that plaintiff "became sick, sore, lame and disordered and divers bones of his body were broken and injured and he sustained various contusions, bruises, and lacerations about his head, arms, body and limbs and divers of his muscles, tendons and sinews became wrenched and bruised and he suffered a severe and permanent abook to his nervous system and suffered great pain and anguish and will in the future thus suffer; that he sustained contusions and lacerations of the scalp, completely severing certain nerves of his head, leaving irregular deep and permanent scar on his face and forehead; dislocation and fracture and fracture of the shoulder bone, certain of his ribs were fractured and broken, ligaments of the ankle were torn leaving the ankle permanently disabled and certain of the vertebrae of his spinal column were fractured: * **

Defendent next contends that "the court erred in overruling the motion of the defendent, made at the close of all the evidence, to instruct the jury to find the defendant not guilty," for the reason that the "plaintiff failed to prove the centents of the statutory notice set forth in the declaration." Defendant is not in a position to raise this contention for the reason that during

he are force data course desireded . "Additional mill of browther the declaration is fabully defective. Plaintiff contends that arolared at has glevitoched but maites be eased a reduce one tower -mas a tanhanish of revenu dustrilling a st II. . Nothrev asta been ni smuon savit ani imil bebennes ad si ti i di escre es molenes horn a animia Jesus biscom and agreement & Porogra ad AssiskTiment enemals, has follower the support to manager to an anticor to no house at tomen biscove out that the box to a reliantmos out rehands and . direct the said the will be and under the property edi ha uso't han and , and adgranting besquis times full gallarb at aff. June becase and he well but and south and manufact of the goal's Trucks paragraph of grant one eliegn-the pharmachine property segre, been able the seems sent when the best one and when the and injured and be suchained various containes, bruises, and lacery blone asont his hear, arms, body and limbs and divers of his muscles, busings and sheeps became wrenched and braines and be males ed a server and permanent check to his nervous exchem and entraned and duty you then ment require the the department one many course suntained contraited according of the acolps completely ... has good unlarge at his head, larvel program despite deves e and corr un his face ond torchests dislocation and fracture. and fracture of the circulder bend, certain of his ribe very fractured ables and helysed star othe added of the accountil account and Leuige aid to servider od to mistro bas beidestb videonemen "" " A ROTHINGACCH COOK BERLING

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the trial it stipulated and agreed "that the usual statutory notice was served on the City of Chicago." Even if this stipulation had not been made there would be no merit in the point it new makes. The notice, as pleaded in the seclaration, stated "that the physician attending said Richard J. Laffey is Doctor C. K. Barnes of 7849 South Eggleston 'venue and that said Richard J. Laffey was taken to the Auburn Park Hospital situated at 78th and S. Eggleston Avenue." The testimony showed that Pr. Barnes was the attending surgeon at the uburn Park hospital, located at 78th street and Bouth aggleston avenue, and that plaintiff was taken there is mediately after the accident and remained there for some time, during which period he was attended by Dr. Barnes. The proof further showed that the residence of the sector was 7838 Stewart avenue, and defendant argues that "it metters not whether the city was or was not misled by the statements contained in the notice," as it appears from the record that plaintiff failed to prove a material allegation of his declaration, towit. "that the statutory notice set forth in the declaration set forth the correct address of his attending physician." Par. 7, sec. 2, ch. 70 Cahill's/Rev. Stat., provides: "iny person who is about to bring any action or suit at law * * against any incorporated city * * * for demages on account of any personal injury shall * * * file in the office of the city attorney * * * a statement in riting * * * giving the name of the person to whom such cause of action has accrued. the name and residence of person injured, the date and about the hour of the accident, the place or location where such accident occurred, and the name and address of the attending physician (if any)." (Italies ours.) The statute does not require that the residence of the attending physician be given, and the proof showed the address of the physician as stated in the notice that is pleaded in the declaration.

The third and last contention of defendant is that the

malles qualified to send out the first that you have beind up to the last sale engulan went of thing out all them on of blues wands them mood don The police of fact the six desired in the profession without the population given the well him on the terminal areas for the leading and brought the property of the partie of the property of the partie of the parties of the pa and there leaders are the right to believe a leading of the residual and he menutan publics, in sail and second with furn menuta year death moranting offer an areas of the analytic statement of the second the state of the s and told escalings (these for some time, excited exists where the was abtended by Dr. Barnes. The proof further showed that the recidence of the dector was The Steeks are defendant argues that off novices not whether the city was as and not misled by the statemante contained in the sector." as it appears from the record that plaintiff failed to prove a material allegation of his declaration. for mularatons and at Adroi don action greendade out tent" , theor forth the entry of address of his historic physician." Pers 7: cor. To the Tr smill the a belon previous; "one person she is chous tio beisrogreed the tening . . a thi to the to millou the naird act and a section to the personnel to the action of the control of in the office of the ofty steering * * a contement in writing a * * showever and melto to sense done norit of meat and to men and pairing and and dander han aden and interest the analytics and about and sherance said on down orens melenal to young oid thent occurred. noticel) ". (was it) actively authoritie and to provide the bass and bus spirituality and to something out part organic has such anching of the strending physician be given and the proof showed the server of the physician encionreford and at heberty at find colour and at beinga co

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court erred in giving, at the instance of plaintiff, the following instruction: "4. The Court instructs the jury that if from a preponderance of the evidence, under the instructions of the court, you find for the plaintiff; in such event, in determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should take into consideration all the evisence sertaining to plaintiff's physical injuries, the nature and extent of plaintiff's physical injuries, which are the proximate result of the accident, if any, so far as the same are shown by the evidence; his suffering, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe from the evidence before them in this case he has sustained, or will sustain by reason of such injuries; and may find for him such sum as in the judgment of the court, will be a fair compensation for the injuries he has sustained or will sustain, if any, so far as such damages are claimed and alleged in the declaration or some count thereof, and proven by a prependerance of the evidence." (Italies ours.) Defendant argues that the instruction is erroneous for the reason that it is for the jury, and not the court, to determine the amount of compensation that shall be awarded to the plaintiff. befordent admits that other given instructions etated correct rules of law relating to the question of comages. The instruction coes not direct a verdict, and while there is manifestly a typographical error in the use of the word "court" instead of "Jury." the jury could not have been misled by this error, superially in view of the fact that other instructions correctly informed them as to the law bearing on the subject in question. Mowever, the instant contention is without the slightest merit for the reason that his instruction relates solely to the question of damages and defendant does not contend that the

cauct erred in viving, at the instance of plaintiff; the following in north 12 2 of the the feet best and the fall the continue on a prepondurance of the evidence, under the leasendrious of the court, Differed Any participated by allered floor of 1750 building now set but I are If every alde all present as haldless at Whitesha one as much to entitively may have a right in, our they should bely have many for add and retained to slowing of This index of provincing warning and the and one makes a contental fortages affected by the time into except greeks at a time and as to any in any it and to these of actions the settlement has entroping if entry tennished from some pays but and page and believe from the eviluance sature them in this case and the bar testratula dome to neuror to malesa file to testatana und Thole of liv , suco eds to december at Il salarina Ille to enter-re and according to the ref and research any, or for or each demands are claimed and alleged in the declaration ". acres in the set in secretary as the secretary and in the extension and napomorro at molicurione and time approximated (.acre applicati) you the remove the his to the the gray on the property to deliver the real . Triculate out of behave of florie to do nothernouse be furemented to safer sparred asiass accidencion; every roder that affect become beles vi ting to the question of descree, The instruction does not rorse (satispermony) a vijualinam at areas aliam and state of a state for blues well said ". west," he bestand "stance" been will be our bed all send Jost and to water at the langua grates sidd to bala a ness aved end no mairage well seld as as mould begreated the transco anothers and reside ads sucision at material accident solutions and souther at south and of which we have the the second that the the confidence will not prove the and said breakers sen anch Smithelish has southed to molders, and demages are excessive. Considering the seriousness of the injuries sustained by plaintiff the versiot of \$3,500 is a moderate one.

That the plaintiff had a meritorious cause of estion against defendant is not disputed. Jefendant has had a fair trial, and the judgment of the Superior court of Seek county should be and it is affirmed.

AFFIRMED.

Gridley and Kerner, JJ., concur.

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Claulty a Kriner, JJ., comenr.

34616

JAMES C. WARD, Appellee,

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GRAMM TAUNK WESTERN RAILWAY COMPANY, a corporation, appellant.

APPEAL FROM SUMMIOR COURTY.

261 I.A. 6374

Mr. For iding ju tiol scanian belivered the opinion of the solect.

James G. Lard, plaintliff, suck Grand Trunk Lestern Railway Company, a corporation, in an action in case. There was a trial before the court, with a jury, and a versict returned finding the defendant guilty and assessing the plaintiff's demages at \$5,000.

Judgment was entered on the verdict and the defendant has appealed.

'n March 13, 1929, the plaintiff had been in the employ of the defendent as a brakeman for four days. On that date, he was working as an extra brakeman on the night shift, on an east wound freight train which left Chicago about 9:30 p. m., warch 13. 1929. At about 12:05 a. m., Earch 14, 1929, the engine of the train ran into a "derail" at "tilwell, Indiana, and turned ever. The plaintiff claims that he "was standing up in the engine looking for signals" and that as soon as he saw the red light the engine has already hit the derail and "was practically turning over" and that he junger and custained the injuries for which he sued. The defendant has assigned and aggued a number of points in support of its contention that the judgment should be reversed and remanded. In the view that we have taken of this appeal it is necessary to consider only one, The defendant contends that the overwhelming weight of the evidence proves that the plaintiff did not suntain the alleged injuries in the accident in question. After a very careful

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Inmed C. Tird, plaintiff, such Grand Truck Second Hallang Congony, a corporation, in on section in case. There was a trial before the court, with a jury, and a vertick returned finding the defendent miley and coopering the plaintiff's accepts at \$6,000.

of the detendent so a breateness for four days, so that dates he sae couldny as an antita bretoman on the michi midfe, on an east bound freign train which left Unicess about \$130 g. w., hereight bound freign train which left Unicess about \$130 g. w., hereight for the first in the same abouting up he tim engine looking for almost of the continuity of th

consideration of the evidence we are satisfied that this contention is a meritorious one. Indeed, as we read the evidence bearing upon the instant contention, it is difficult for us to understand the verdict of the jury, and still more difficult to understand the action of the trial court in sustaining it. However, as the case may be tried again, we refrain from analyzing and commenting upon the many facts and circumstances that beer upon the instant contention.

The judgment of the Superior court of Sook County is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley and Kerner, JJ., concur.

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The judysent of the Superior court of Sock Sounty is

Belaking and Elemen, 27., commer-

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STANLMY J. LASSA, Appellee,

Y.

PAUL S. BERGAMIEI, Appellant.

APPEND PROM MUNICIPAL COURT

201 I.A. 638'

MR. PROSIDING JUSTICE EGATLAN BELIVERED THE OPINION OF THE COURT.

Stanley J. Lassa, plaintiff, succ Faul S. Bergamini, defendant, in an action in contract. The case was tried before the court, with a jury, and there was a verdict returned finding the insues equinot defendant and assessing plaintiff's damages at the sum of 1456.68. Judgment was entered on the vereict and defendant has appealed.

furnished by him to defendant. Counsel for defendant has seen
fit to refer to a number of well known principles of law that have
no application to any alleged errors that have been called to our
attention. To illustrate: befordant, in his brief, alleges that
repeated statements of plaintiff's counsel in argument were so
prejudicial as to require a reversal of the juagment, in view of
the trial court's failure to su tain objections to them, but neither
the argument of counsel for plaintiff nor defendant is contained in
the bill of exceptions. Defendant alleges, in his brief, that the
case should be reversed because of misconduct of plaintiff's counsel,
but he fails to point out, in his argument, the alleged misconduct.

Defendant contends that the trial court erred in permitting the counsel for plaintiff to ask leading questions of plaintiff upon direct examination. Our attention has not been called to the particular questions of which refendant complains. From a reading of the

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THE REAL PROPER SET MATERIAL PROPERTY AND ADDRESS.

defendant, in an action in contract. The case was tried before the court, with a jury, and there was a verdict returned rinding the issues ognized defendant and nearesting plaintiff's demages at the same of . 156.68. Judgment was covered on the verdict and

Particular by view to defendent. Counced for defendent has need furnished by view to defendent. Counced for defendent has need fit to refer to a number of sell known principles of less that have no deplication to any alleged errors that have been called to our attention. To librateate: Tefendent, in his brief, alleges that repeated exclaments of plaintiff's counced in argument were so prejudicial as to require a revocal of the judgment, in view of the trial court's reliase to as cain objections to them, but notiner the argument of councel for plaintiff nor defendent is contained in the bill of exceptions. Defendent alleges, in his brief, that the case should be reversed because of miscendent in but fails to point out, in his argument, the slight miscendent.

infordant contends that the trial court errod in permitting the course of plaintiff upon the course for plaintiff upon direct examination. Our stiention has not been called to the particular questions of which cotenient conglains. From a rending of the

testimony of plaintiff, however, we find that on several occasions leading questions were permitted. It appears that plaintiff. shortly before the time he testified, had suffered a paralytic stroke; that his memory was bad and that it was difficult for him to talk. The court stated that he allowed the leading questions because of the condition of plaintiff. In fact, plaintiff's condition was such that his counsel finally asked to be allowed to withdraw the witness. The allowance of leading questions, calling the attention of the witness to the subject matter with reference to which his testimony is desired, rests largely in the discretion of the trial court and will not call for a reversal in the absence of a clear abuse of discretion. (McCann v. The People, 286 Ill. 562.) There is no merit in the instant contention. Neither is there the elightest merit in the contention of defendant that the trial court asked plaintiff certain leading questions and thereby prejudiced the defense.

Defendant next contends that the verdict was not only clearly against the great weight of the evidence but that plaintiff failed to make out a prima facie case. After a careful examination of the evidence we find no merit in this contention.

Defendant next contends that the trial court erred in limiting the time of the closing argument to the jury to fifteen minutes on each side and thereby unreseconably abridged the constitutional right of defendant to have a defence by counsel. From the record we ascertain the following: At the conclusion of the evidence the court stated that he would allow each side fifteen minutes for closing argument, and thereupon the counsel for defendant stated: "I don't think I'll cover it in fifteen minutes." No objection was made to the time limit, and while the record shows that counsel for each side addressed the jury, the arguments are not contained in the bill of exceptions. For aught that appears in this

tentment of plaintiff, herever, we find that on everal occasions . This mining and a range of the contract of t all before the time he tentified, had suffered a permitting straint that his meany was had and that it was eithingly for him anolicous pulled and becoile ad indi beside twee and because of the condition of plaintiff. In fact, plaintiff's of beveile ad of busin gliant? feature wit isn't down now motifies sichdres the witness. The allowence of lending questions, colling somerotor dite retiem toofdee out of section out to meliants and to which his testinony is desired, rests largely in the disortion generals out at Leavever a net fine con filty has seven Lates out to at a clear stars of discretions (Defens or The Jungle, 556 131 - 266) There is no moris in the inneant contention. Neither is there in stwo Lotts ods smit sanbarrob to muismosmos ods at strom sectifities besing our viereds bas ameliacup amibeel mistres Ithinialy botton the dufamue.

tiff failed to make out a prima facie case. Ther a careful
examination of the widenes we find up merit in this contention.

limiting the time of the elosing argument to the jury to fifteen liminutes on each aide and thoreby usressenably abridged the committees on each aide and thoreby usressenably abridged the committeent time relations; the the conclusion of the evidence has court ababed that he vould allow each aide fifteent winufes for closing argument, and thereupon the countal for defendant ababed; the time that is a fire the time that a fire the time and while the record above that counts; the resord above that concentrate are not consist for exceptions. For ought that shall are not on-

record, counsel for defendant may have concluded his argument in less than fifteen minutes. He certainly failed to make any request for further time. The present contention is clearly an afterthought.

There is no merit in this appeal and the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Gridley and Merner, JJ., concur.

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34634

ANNA G. FLOOD and HUMET T. FLOOD.

Appellees.

V.

JAMES HOULIHAN, Appellant.

COURT OF CHICAGO.

IN . PRESIDENG JUTTICE SCANLAR D'LIVERED THE OPINION OF THE COURT.

Anna G. Flood and Emmet T. Flood sued James Houlihan in the Municipal court of Chicago in an action in contract. Plaintiffs brought the action to recover for rent for the month of May, 1950, 170, and attorney's fees, \$15. Judgment by confession for \$85 was entered upon a written lease between the parties. Subsequently, upon motion of defendant, he was given leave to defend, the judgment to atand as security. The case was tried by the court, without a jury, and there was a finding "that at the date of the rendition of the judgment by confession there was due from the defendant, to the plaintiffs, the sum of \$85," and a final judgment was entered that the judgment entered against defendant by confession stand confirmed. Defendant has appealed.

Plaintiffs were the owners of the spatment building, to. 6525 Worth Francisco avenue, Chicago, and on October 1, 1928, there was a written lease executed between them and defendant by which the upper floor of the building was demised to the latter for residential purposes for a term of two years, at a monthly rental of \$70. Defendant appears to have paid his rent regularly for a period of nineteen months and to have made no complaints until becomber, 1929. He continued to occupy the premises until May, 1930, but after December plaintiffs were competled to enforce the collection of the rent by

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Anna 2. Thous and Ameet P. Flood sued James Houlings in the value of the value of the value of the brought the selies to recover for rest for the month of May, 1930, 19

Claimitify were the commerce of the speciment building, To.

6528 North Francisco evenue, Uniong, and on October 1, 1918, there
was a written load emented between them and defendant by which the
upper floor of the building was demised to the latter for saddential
upper floor of the building was demised to the latter for saddential
unipeers for a term of two years, at a monthly remtal of 190, beford

and appears to have pute his rent regularly for a period of ninetern
months and to have sade so despinishs until hecomber, 1909. He con-

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confessions of Audgment on the lease and garnishment proceedings. Defendant and his family left the premises on May 1, 1930, and he claims that he was constructively evicted by reason of obscenity and vulgerity on the part of plaintiffs and by various interferences and annoyances perpetrated upon him and the members of his family by plaintiffs. The court heard the evidence bearing upon the question of the alleged constructive eviction and found against defendant in that regard. . e are entirely in accord with the court's finding. The evidence shows that plaintiffs desired to be at peace with defendant and that the latter was a man of bad temper, who in his dealings with plaintiffs exhibited such a disregard for common decency that we cannot sully the records of this court by stating the facts that have led un to this conclusion. A finding in favor of defendant would not have been justified under the proof. It is to be regretted that the time of this court should be taken up in passing upon an appeal like the instant one.

The judgment of the Municipal court of Chicago will be affirmed.

AFFIRMED.

Gridley and Kerner, JJ., concur.

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ARREST AND ADDRESS OF TAXABLE

34646

BENZOLINE MOTOR FUEL JORPANI, a corporation.

Appellee,

V.

consumers petroleum company, a corporation,

appellant.

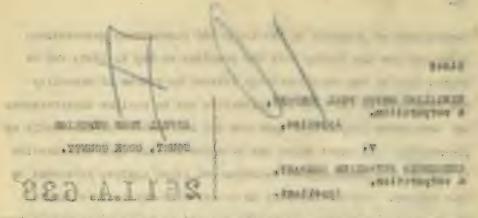
APPEAL PROP SUPPLIOR GOURT. COOK GOUNTY.

261 I.A. 638

MR. PRESIDING JUSTICE SCANIAN DELIVERED THE OPINION OF THE COURT.

Bensoline Motor Fuel Company, a corporation, sucd Consumers Petroleum Company, a corporation, in assumpsit. There was a trial before the court, with a jury, and a verdict returned finding the issues for plaintiff and assessing its damages at the sum of \$1,700. Judgment was entered on the verdict and defendant has appealed.

Plaintiff's original declaration consists of one count, which alleges that on, towit, October 21, 1928, plaintiff entered into an oral agreement with defendant "regarding the leasing of certain tank storage space," owned by defendant, and "that the defendant leased to the plaintiff certain storage tanks aggregating a capacity of 340,000 gallens of tank storage space, for the purpose of storaging benzoline, a certain fuel manufactured and sold by the plaintiff," and that as a part of the agreement defendant agreed that the storage tanks "contained steam coils which would hold steam of sufficient pressure for the heating of the oil and benzoline, to be stored in seid tanks by the plaintiff," so that the benzoline or oil could be pumped from the said tanks when the weather was cold; that after the cold meether had set in the bensoline froze in the tanks; that plaintiff attempted to force steam into the tanks



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Remarka Motor Puel Company, a corporation, aud

mas a trial before the sourt, with a jury, and a vertica returned
finding the insues for plaintiff and accessing the desages at
the sum of 11,700. Judgment was entered an the verdict out
defendant has eppealed.

. intiff's original declaration consists of one count.

into an oral agreement with detendent "regarding the leasing of contains tank storage space." owned by defendant, and "that the contains tank storage space." owned by defendant, and "that the converte beneating. a cartain fuel manufactured and sold by the plainests," and that as a part of the agreement defendant agreed that the storage tanks of contained other which would hold atom of sufficient process; for the heating of the cit and beneating of sufficient process; for the plaintist." as that the beneating or all could be yeared incomed that the seather was or all could be yeared from the seather was or all could be yeared from the seather was colds that the plaintist the beneather was colds that plaintist attempter to force store in the beneather true in

but the coils therein would not hold steam; that the benzoline was frozen during the months of December, January, February, March and .pril; that during that time plaintiff could not withdraw any beneoline except small quantities which remained liquid or melted. due to the heat given by the atmosphere; that the market for benzeline drapped and by reason thereof plaintiff sustained damages in the sum of \$10,000. The count also alleges that it was a part of the agreement that it, defendant, would supply the steam and heat for the tanks, and that plaintiff would pay for the coal and fuel used by defendant "in heating the tanks and the supplying of the steam." and that plaintiff agreed to pay defend at \$450 a month "ouring the time it would occupy these tanks." After a jusy had been evern to try the issues, plaintiff, by leave of court, filed an additional count. This count alleges that "on the 21st day of October, 4. . . 1927, it, the plaintiff, made and entered into a certain oral agreement with the defendant * * * for the lessing of certain storage space in a certain 340,000 gallon storage tank, owned and controlled by the defendant, for a good and valuable consideration; and the plaintiff avers that the defendant leased to the plaintiff this said 340,000 gallon storage tank space at the monthly rental of four hundred fifty dollars (1480.30) per month; and then and there the plaintiff avers that a part of said oral agreement made by the plaintiff and the defendant for the leasing of said tank storage space by the plaintiff the defendant agreed with the plaintiff that the storage tank so leased by the plaintiff contained steam agils which would heat the tank and which would hold sufficient preseure of steam for the heating of the benzol to be stored by the plaintiff to the proper temperature at which said benzel could be pumped from said tank curing the months of December, January, February and March and during the period of cold Weather; and the plaintiff avers that the said lease made by the plain-

the tile soil and the land to be been all the bounds of the box Crosses during the season of Persons, Samuers, New York, Royal and open speaking the last bloom thinward water both correct sort things butter on blugit to bloom to be netrically the netting due to the next place up the absorptions; lack the market for beautiful min add at prepared bightness (hibsted) becomes mouse of the hoppeds or fragment who seems the state of the contract of the contract and not that the main oil officer than applicable and done that trader, and then giftiwitte until you you bit you will need by has "grants and "to manylogue out the extent out year out and an a manufacture and the column three a little to begin but or to be a fillentering tools It bead acres when there between the best best and best of Depris Capatricing on India phone to exect our attributed prompt only this same alleges that "en the flat dey of Detabers As is 1989, its dily inpusarya fore mistres a coal beresus bus when ithinish and the defendant to the line length of cortain storage space in a add the helialites one comme where represent stilling the tipered third air and the continuous authors and the plant and the orego that the account leased to the plaints this and cave gold's nerious much to larger wishing and de chara dues exercis soller draws Thinkely and orest but mad but (almos tog (ad. data) william add has thiominic odd to show successar fore blue to doing a confi Trisminio and to some exercise that blee to technol suit set enabastab or dust emercia est that Widnials out Atta became imphotob out and deed by the plant comining beam also and the barel muisted out to a mose to studenty desirition blad blown soins bue west of the branch to be stored by the plaintlif to the proper temporate adinos odi natrub sens blue meri begang ad bisco feared des delles se of December, Francy, Tobracey and March and during the period of cold whisig odd yd shom sawel five odd fodd group tildately ond inc graddaaw

tiff from the defendant of the storage tank above was for the express purpose of storing bensol, a product which froze at a high temperature;" that plaintiff agreed to pay defendant the cost of the coal to be used by defendant to produce the steam; that defendant undertook and agreed to load and unload cars and other equipment in the filling and emptying of the tank and to use its pump in pumping the benzol in and out; that plaintiff took possession of the tank and filled the same with benzel and paid all costs and charges for handling, filling and pumping: that the product remained in the tank until after the cold weather set in and plaintiff then sought to remove divers of the benuel and attempted to force steam into the coils but that said coils would not hold steam and would not heat the fuel and benzel so stored therein, so that plaintiff often attempted to force steam into said tank and coils, and because of defendant's failure to supply good coils to heat the said tank, it, the plaintiff, could not for a long time remove the benzel so stored from the tank because the benzol become and was frozen and could not be heated to a flowage condition and that the benzel was frozen during the months of December, January, February, Barch and april, and that plaintiff could not withdraw or remove any of the benzol except such small portions as remained liquid or melted by reason of the heat of the atmosphere; and plaintiff further avers that when it could remove and did remove the bensel from the tank it was pumped by defendent with pumps used by it to pump fuel oil from adjacent tanks, which greatly discelored, injured, diluted and ruined the benzol, whereby the market value of the benzel dropped, to the damage of plaintiff in the sum of \$10.000.

Defendant alleges and atrenuously argues a number of points in support of its contention that the judgment should be reversed and the cause remanded. In the view that we have taken of this appeal we will notice two only.

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Defendant contends that there is a material variance between the declaration and the proof. Defendant contends that upon the trial of the cause plaintiff's case was based entirely upon the claim set up in the additional count and that there was a material variance between the case alleged in that count and the case made by the proof. That plaintiff's once was tried entirely upon the additional count is clear. That count alleges that "on the Mlet day of October, . . . 1987, it, the plaintiff. made and entered into a certain oral agreement with the defendant." No agreement made at any other time is alleged in the count. The evidence introduced by plaintiff showed two separate agreements, one made in October and one in November. Plaintiff contends that defendant has waived the alleged variance by not specifically raising the question in apt time in the trial court. The record does not justify this claim of waiver. then the witness Kesner, called by the plaintiff, testified to the agreement made in November, the following occurred: "Mr. Bartel (attorney for defendent): Now. if the Court please, I move that that be stricken on the ground that it is not in conformity with the declaration. The declaration alleges that this took place on the 21st of October, 1927. The Court: Overruled." Plaintiff assumes that in the additional count it alleged the date of the agreement under a videlicet, and it contends that, therefore, there is no merit in defendant's contention; but it is clear that in that count plaintiff did not allege the date of the agreement under a videlicet. Plaintiff next contends that "no motion was made by the defendant at the close of plaintiff's evidence to strike this evidence from the record nor was any such motion made at the close of all of the evidence, # * and its failure to so preserve its r cord amounts to a saiver." The cases cited by plaintiff do not support the instant contention. Plaintiff

the constant of the same of th Lady what the contract of the party of the state of the s whether must be some artificial recovered by the relative and upon the claim set up in the inditional count nor that there was " has about fact of hepotic most the morning restrict Talandor in SERVICE NAME OF THE PARTY OF THE PERSONNEL PARTY OF THE P wealth open in montions court is cheer. That court allows CANADATA SER ATT ATTECHE AS A CENTRAL TO THE SAME SALE OF SAME ". Incomplete and Ariv Tensoring Corp. SCADING IS NEXT SECRETAR NOW ATHE and . Input and all homes to all waits wants upon to whom to an all all animphonetra of tagin and mount to be full by the account towards ted almost in deteller and one in Private . Patholic removada almost a mede the content of the c mitelar vilaciliases ser ve somaliav bayelle she seview and Smakes about Your grown beauty and almost Calcul and and and and and and and and and Apolice that the strains of release the classes brooms and the his the pisineiff, beetified to the neuconem ande in Boyomber, the Tallandan narawash "Da. Bartal (atlantage las estamants) a Van ... the Court please, I move that that be atricked on the groupe that nelgarafore the conference of the decimental sees al de allages that this took place on the risk of October, 1819. The invo Especiatible and a tend commence Thinking ", being the Colored terms" -may it has . foolfably a rehow improver . at to able out benefit it tends this, therefore, there is no merit in defendant's contention sond and equals the till Thistitule sound and all suit reals at the of the saverment ander a wideliers. Plaintill next combends that u. Thinhald to seels only is suchmotal and add about any halson on. Nove the new ton breeze and mark combine ald exirts at complive off the " * " appreciate will be lie to see a lie of the modern failure to so preserve list rever amounts to a valver." The ceres Wilsmini . . nolinosano unateni uno successo des ob Filiciala ge besio

also contends that "the question of variance is waived, in that the defendant did not include this proposition in its assignment of error." In support of this contention plaintiff cites Keney Killing Co. v. Baker-Vignall & Co., 186 Ill. App. 398. In that case it appeared that the question of variance was not raised in the trial court and there was no assignment of error that the court erred in the admission of evidence. In the instant case the question of variance was raised upon the trial and one of the assignments of error is: "The Court erred in permitting impaterial, irrelevant and incompetent testimony on behalf of defendent." This essignment was sufficient to cover the question of the alleged variance. We think that there are other assignments of error sufficiently broad to cover this question.

Defendant contends that "the verdict is clearly and manifestly against the weight of the evidence." After a careful examination of the evidence we have reached the conclusion that this contention is a meritorious one. As the case may be tried again we refrain from analyzing and consenting upon the facts and circumstances that bear upon the instant contention.

The judgment of the Superior court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley and Rerner, JJ., concur.

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Once it appeared that the the theories of variance may not retend in the arrow the two that the count of the the tastest in the tastest the the tastest the the tastest the the tastest of the the analytics of the analytics of error is: "The Court errod in permitting inactorial, irrelayint and incompotent testiment on behalf of actordays." This irrelayint and incompotent testiment on behalf of actordays." This irrelayint that that their series are their assignments of error.

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The judgment of the Superior court of Gook county is reversed one the count is reversed.

STANDON VERY COMMENSA

STREET, and Johnson, Street, Street,

34667

LUSSKY, WHITE & COULIDGE, INC., a Corporation,

Appellee.

THOMAS F. KERRELLY,

Appellant.

APPRAL FROM MUNICIPAL COURT OF CHICAGO.

2011.A. 638

MR. PRUSIDING JUSTICE CARLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant in the aum of \$330.23 in a suit upon two checks. The case was tried by the court.

Plaintiff sued to recover upon the two following checks:

"Kennelly & Heffernan, Inc.

Furniture Co. 4641 Lexington St.

Chicago, Ill. Sctober 28th, 1928

Pay to the order of LUBURY WHITE & COULINGE. INC. \$202.17

The Sum * # \$202 and 17 cts Dollars

To West Town State Bank Madison St. at Testern Ave. Chicago.

T. F. Kennelly"

"Mennelly & Heffernan, Inc. Furniture Co. 4641-43 Lexinaton St.

Chicago, Ill. October 24th.1928

Pay to the order of Lussky hite & Coolidge, Inc. \$128.06 The Sum * * \$128 and 06 cts. Dollars

To West Town State Bank Madison St. at Western Ave. Chicago

T. P. Lennelly"

ohn Upon the trial the checks were marked Plaintiff's Exhibits 1 and 2. In defendant's affidavit of merits he avers that the two checks were not executed by him individually, but as an officer of Kennelly & Heffernan, Inc., a corporation, and that the indebtedness, if any, is the indebtedness of that corporation, and that defendant does not owe plaintiff \$336.23, as alleged in plaintiff's statement of claim, or any part of said sum.

Heffernan

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PARKE A STREET ATTREET, DESCRIPTION AND ADDRESS. R PART COLLEGE COURT OF CHICAPO 0 19 e Town Day 1 .T LAHUMI "888 A.I 198 · SERRETERIES . Tidgo der eg morero der eliminalist Walledo Otrove endelen e This is no count from a judgment opening he'region is to an ad \$5.00.20 to a sub- word two checks. The ease was tribe LATERION AND THE Claimetal emed to resear upon one tes following shoots: Ternen .self commonthall a self-angula with wantieriers . PE Water Spirit Little Chicago, Ill. Cotober Asth. 1998 . 5 AND ADDRESS OF A CORNER PERSON OF TAXABLE PARTY. The case of the last west AT of the MEMILTON 5-1 MARK REAST SHEET SHEET Topin Table Delication CAMPBERSON OF ALL POSITIONS a diameter SOUT ANSWERS THE TRANSPORT CI II MOUNTAITINGNE AND RECEIPTANCE CONTRACTOR SCHOOL THE CONSESS THE PERSON AND REAL PROPERTY OF SECURE PROPERTY AND ASSESSMENT AND \$0.8KI ando his bus anto o REMILECT 10 that I ada to I have . ov gredet da . dt sos . . "allonno" all all opensies:

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& Hefferman, fue., a corporation, and that the insobtedness, if any,
is the indebtedness of that corporation, and that defendant does not

ove plaintiff [130.33, as alleged in plaintiff's statement of claim,

Then plaintiff rested its case defendant, in his defence, did not call any witnesses or introduce any commentary evidence, but simply offered to prove that "Plaintiff's Schibits 1 and 2 were given in consideration of goods, were and merchandles used by Kennelly & Reffernan, Inc.; that the plaintiff had theretofore accepted checks signed in the same manner as Plaintiff's Exhibits 1 and 2 and that Plaintiff's Exhibits 1 and 2 were corporate obligations." Plaintiff's objection to this offer was sustained.

Par. 40 of the Regatiable Instruments act provides as

"short the instrument contains, or a person adds to his signature, weres indicating that he signs for or on behalf of the principal, or in a representative aspecity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as agent, or as filling a representative character without disclosing his principal, does not exempt him from personal liability."

lefendant contends that it appears from the face of such sheek that de endant in signing it was acting in a representative capacity, in behalf of a principal, and that therefore he comes within the provisions of paragraph 40 and is not personally liable for the checks; that each check, upon its face, and without the introduction of any parol evidence, shows that he signed it "for or on behalf of the principal, or in a representative capacity," and that he is therefore not liable on the instruments. Fone of the Illinois cases cited by defendent supports this contention. In Mathis v. liberty traw Spreader Co., 238 111. App. 467, it was held that where a note was signed with the name of a corporation followed by the president's name, with the affix "Pres.," the president was not personally liable on the note, in view of paragraph 40 and the proof offered to show the capacity in which the desendant signed the instrument. But it was further held that if the president had signed his name, followed by "President," or other descriptive words, but had not disclosed his constant of the second of the organist of the second of th

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principal, he would be personally liable under paragraph 40, and parol evidence would not be admissible to show the capacity in which the note was executed. In La Belle Bat. Bank y. Tolu Rock & Rye Co., 14 Ill. App. 141, the acceptance of the bill of exchange drawn on the defendant corporation was signed: "Accepted, payable at 41 Fiver street, Chicago. Tolu Bock & Rye Co. F. E. Davis, Treas." In Scanlan v. Keith, 102 Ill. 634, the note "was signed underneath, at the right hand, 'Sam'l L. Keith, Pres't Chicago Ready Roof's do.,' and at the left hand, at the usual place for the signature of an attenting witness, it is signed, '. H. Fretzinger, Sec'y,' with the seal of the 'Chicago heady loofing Company' attached." In Lecowski v. Grabarski, 181 Ill. app. 279, where the signatures to a note were: "albert F. Grabarski, Pres. F. J. Tomezak, Secy.", the court held that the introduction of the note made a prima facte case against the defendants individually but that the trial court, under the particular circumstances of the case, properly permitted the defendants to introduce oral evidence to prove that the note was not given for the individual indebtedness of the makers but was given to the plaintiff by a corporation of which the makers were president and secretary. Undoubtedly, in view of the nature of the signatures. the ruling in that case, in reference to the right of the defendant to introduce oral evidence, runs counter to other Illinois cases, but it does not aid defend at's contention. In the instant case the signatures of defendant on the checks are not followed by any designation of any official or representative capacity, and therefore none of the foregoing cases cited by defendant is applicable. Hill Binding to. v. F. J. Roch Co., 207 Ill. App. 217, also cited by defendant, is not in point. In that case it appeared that the corporation had the came name as the precident of the corporation, and the court held that oral evidence was samissible to show whether the signature was intended to be that of the president paraonally or of the corporation.

principal, be appropriate aldeli vilescente ad biner of talection parel evision would not be assistable to since the capacity in . will the note was assented. In in Inlie Not. Renk v. Yolu Rook. onesing to the the top the management the bill of enchance REPORT AND ADDRESS SERVICES FOR PARTIES AND ADDRESS AND ADDRESS OF TAXABLE as at stem street, calcour, had had been by the low F. T. Howard Tuess." In Becalag v. Kelting 100 711. 634, the mote "was signed amelegametic at the sight beam, 'Sem'l L. Helike Spen't Chisage andy have and of the lett bend, at the and of a court glace for head signature of an ablacting sience; it is signat, "". I. Tribing, ".bemaife 'creme' sailee' gues apeals' air to lase att stir 'g'and of standard ve deposits had all other been standard ve deposits by a more research "Alliert I's a relationally from the factorial (Sellation Lines court held that the introduction of the note made a prima facin case noing struct Laist add fads fled the birthal administration ods sentage .. app. heldlancy always a years hid to accordange to be principled don now page oil soil every of complive fore compared as educate let movin any sud avenue out to appaloidabili loubivital out ver movin familiarus warm avedem nei deller la militarques e he Thinking mer an and arctary. Undoubledly, in view of the neture of the che signatures, os included and to intradic of concertor of core and of anilor and -gia guis nevo Jandoni est mi anoismotano a in amarab bis lon anno si welfanglesh the telestest for ore execte out no duckests. It portract ond to enou orelevant bun, thingue evidence organization to intuitio year to foregoing same often by defractant to applicable. Mill Binding Co. som at acommonah the dead came all and all took at a we were and pull collection of their herange of one of all all of the some name as the precident of the corporation, and the court bill pay evelounts and residence would be ablicated and couchire Lary state attended as the time of the provident personally or of the carporulion.

perendent's instant argument assumes that oral testimony is unnecessary to prove the capacity in which defendent signed the checks, but in his argument in support of his accord contention he states that there is a substantial doubt raised from an inspection of the face of the checks as to the capacity in which he signed the instruments and that, therefore, oral testimony was necessary. There is another reason why the instant contention cannot be sustained. Paragraph 40 contains the provision. "if he was duly sutherized," and there was no evidence introduced by plaintiff or defendant to prove that the latter was duly authorized to sign checks for Kennelly & Meffernan, inc. The instant contention is without merit. (See the late case of Berman v. Met. Setroleum Co., 255 Ill. App. 536.)

However, the major contention of defendant, and the one upon which he relies, is that the court erred in sustaining the objection of plaintiff to the offer of proof made by defendent. In his ergument in support of his instant contention defendant says: "There can be no doubt that upon the proof of the evidence offered. rested the defendant's case." Defendant, in his argument, concedes that his defense depended upon his right to show by parel evidence the capacity in which he signed the checks, and he contends that "there is substantial doubt created by the counter-signature and the corporation name on the sheeks, as to warrant the use of parel cyldonce to explain the ambiguity." Plaintiff calls attention to the fact that defendent's signatures on the checks are not followed by any designation of any official or representative capacity and that therefore, under paragraph 40, parol evidence was not admissible to show that defendant signed the sheeks in a representative capacity. In view of paragraph 40 and certain illinois secisions construing it, we think that there is great force in this contention, but it is not necessary to decide it, in view of the ruling we are about to make upon another contention of plaintiff.

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Recovery the neither the address the man the man the man ages which he rolles, is that the court torich is suntaining the objection of plaintiff to the offer or proof made by defendant. In true the broken by the inclusion of the frequent of the service of above the equative and to heavy and mage dads toward on an min event. appropriate and the second of comediae Lorsa va work of daria eta nega accesso cometae etal desti the caprolly in chick he signed the chroke and he contends that and hope and on the residues mis his includes more fairle design as wrends. -ivo formed he was out sanguage as an appropriate out no emph materiories and of moismedia siles Titorial? ". witnesdes out similar of some that that defendently algorism on the checks are not followed by dadi bua ydiorgan avidednessuger un isinkkto ys. Ya mollaupisub ysa of oldinalmin for an action fores to negarate grante to an action to the contract of the contr show that seferences aloned the checks to a representative our title. marriages unorazons aroutily otherwise has to energy be delived at SI sub , noting two a lat at your tages at wents cont white ow . di of these were required to vive at the verteen the

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It appears that defendant did not call any witness or produce any documentary evidence, but rested his defense upon the no-called offer. In Chicago City Ry. Co. v. Carroll, 206 Ill. 318, 328-9, the court said: "Appellant, in fact, offered no evidence upon the matter. No witness was put upon the stand; no question was asked. Nothing was done except a mere conversation or talk had between counsel for appellant and the court. Such procedure as that does not amount to an offer of evidence, and the remarks of the court did not amount to a refusul to admit evidence. There can be no refusal to admit that shich has not been offered, and counsel cannot, by engaging in a mere conversation with the court. although it may relate to the procedure, by merely stating what he desires to do, get a ruling from the court upon which he can predicate error. If appellant desired to make the contention it now makes, it should have at least put a witness upon the stand and proceeded far enough that the question relative to the point it is now said it was desired to affer evidence upon was reached, and then put the question and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the question caked." In Harman v. Indian Grave Drainage District. 217 Ill. App. 502, 509, it was said: "This offer of proof was made before the court had ruled upon the objection to the question and was, therefore, premature. It is not proper to make an offer of proof until the court has sustained an objection to a question propounded for the purpose of eliciting the desired evidence." In Stevens v. Bewman. 68 Ill. App. 549, the court said: "Appellants offered to prove the 'allegations of their petition.' This was insufficient. The witnesses should be called and questioned. or documentary evidence produced. A mere statement of an offer to prove is not anything upon which a court is called upon to act." In Meleon v. Miller, 195 Ill. app. 235, 234, it was held that remarks of the court in a discussion with counsel

It empouse their definitions of a new well only williams are to July and July are as a formation and aller ansorther orders Mile 163-6, the comes mild: "Appellant, in first, offered on order og thurs oil man son sendie of anticol will may come poidentevers stem a depose sant per paidite · bodes on w meldanu. armen out has inclinge out fromme greated had that on end has apprehive to verte am of impose for each fail on erubecore remedies of the court did not smoon to a refuse to same evidence. berelle muse you had hulde fout tlimbs of Leauter on of man eved! . Dune that halv molicarence over a mi gargara yet . Someo loamee ham although is may reinte to the procedure, by merely atering ones he are to do, at a raling from the court appearing in the con proffence Il special was it mailes con come of bettach inclinate Il 4 DELET zel behopping bus hunda and nego accessive for Junei de oved blu ... now di bise non at it inioq out of ortholog moldenny out todo dynam dentrof to offer evidence upon was reached, and then yet the question become any Judy pulto med; one of negs alor of tames and walks has as green by the witness, if he was not allowed to account the HIC . Sci-July separated average as local at manufacture and separate started rice over here; he works width this new all 1000, 1000 all all -eradi ener and rolismus wis of nelsocide and more bains out france and figns loon le nothe an mine of report to me it of the or direction of the court bus suchined an objection to a question propounded for the amount or extends of "countries begins and published be sorging 6M Ill. App. 549, the court sold: "Appellante offered to prove the "allegations of their polition." This was landfiteless, The mitagates should be called and quantioned, or dequacatory articine an admost. s daine man animyen for al grove as wello me to Journalede arom A court to called upon to not." In Delcon v. Filler, 198 file 'pps \$30, Animos Ally nolingworth is al sayon and be extensed their best it will

do not constitute a refusal to admit evidence where no vitnesses are questioned and none placed on the stand. The instant offer does not even show by whom or how the proof offered was to be made (Nat'l Bank of Decatur v. Board of Education, 205 Ill. app. 57, 65). nor does it contain a plain statement of the facts the defendant proposed to prove (ib. p. 66), and there is force in the contention of plaintiff that the offer relates to immaterial matters and contains conclusions of law to which the court sight properly suntain an objection. (The People v. C., C., C. & St. L. Ry. Co., 270 III. 527, 530; Martin v. Hertz, 224 Ill. 84, 88.) "then an offer of proof embraces evidence, a part of which is insemissible, the whole offer may be rejected. Gressey v. Kimmel, 78 111. App. 27." (Harman v. Indian Grave Prainage Fistrict, supra, p. 510.) "then the offer of testimony includes that which is admissible with that which is not, and the competent and incompetent are blended together, it is not the duty of the court to separate the legal from the illegal, but the whole may be rejected when objection is made." (Jones on Evidence, 2d Ed. sec. 894. See also The People v. Venard, 158 Ill. App. 254, 260; Riemensnider v. Riemensnider, 179 Ill. App. 209, 913; Lonnan v. Fonnan, 256 111. 244.) Moreover, the offer, as made, is insufficient for the reason that it was not enough to prove that the checks in question were "corporate obligations;" but it was also necessary, under paragraph 40, for defendant to prove that he was ouly authorized by the corporation to sign checks in its behalf, and the so-called offer of proof does not contain any offer to prove that defendent was an officer or agent of Mennelly & Meffernan, Inc., and that he was duly authorized to sign checks for that corporation, and therefore, for that reason alone, the offer does not establish a defense under paragraph 40 and the action of the court in sustaining an objection to the offer was not error.

exhaustly or bredy sorthern flats of Lauster a stirlibuse for at are questioned and mene placed on the about the tenetiones of what he has born his bar her has been be great differed and not be made (Nat'l Year of lossons v. lenet with the little of the state of the st nor does it confuin a plain of the fattu the defendant proposed to prove (the ge of), and there is fonce in the convention unisome but a testant initudamni at notaler totto but sais Thistiple to as mistaus viregors raghe trues and malate as and to anotoniones onlession. The very end of the the thing to the line In very on and (.id and all the party of allow 1906 its alone on a state structure to dealer to drug a personal or successful to the office our be rejected. Except in though it into our of the Charge with and mutte (that we again, athing a manior, needs water at afon al dates and gits also alone at dates tent sentially among the and the augmented and terrespond not thereto be contained and the slede and and alegalit and more lands and afaranges of Stuop and to your mey be rejected when self-eilen is made." (Jones on Tricence, 24 Ec. ose. 234. Tee also The Frants v. Venerd. 169 111. app. 156, 160; Discounties of Timesonalist Ily (Ile type II), Illy Jones To. (and on the case of the servers) Tarester, the street as ment, is threat the sound ni anosho sais tent every of houses for o or o it inch nearer one to presenting sens "semplify out the out the partition of the action of the partition of the p honizuadno vich you ad dant overy of inclusive you got favy over asbus by the corporation to also whocks to its models, and the no-oplied . In this behing a gord of rello the minimor des cook leets to calle our and officer or agant of Monnelly & Mefferman, Tac., and that he -wroll bus the tracks to the con some to be tracked fine expenses a deligious for meet nette edf , smale mores dud tot , ero! to refliater at twee out to meifor mit bee the de strong rang rebes engestes be the effer wer ask erupe. affirmed. Plaintiff, some time since, filed a motion in this court to affirm the judgment of the trial court and we reserved to the final hearing our decision in reference to the same. It is now unnecessary for us to formally pass upon that motion.

JUDGMENT APPIRED.

Gridley and Kerner, JJ., concur.

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PROPLES STATE BARR OF AULINSTON

Appellee.

V.

HERMAN F. RIDIKE, individually and as executor of the last will of PRIMERICH RED KER, deceased, MINA REDEKER, RIMANORE REDEKER and JOHN REDEKER,

Appellants.

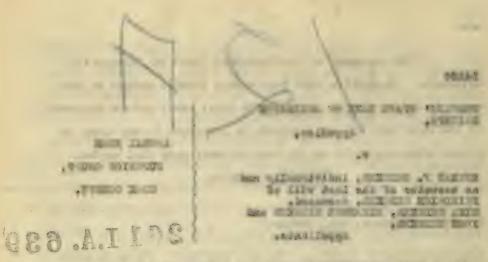
APPEAL FROM SUPERIOR COURTY.

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MA. JUSTICE OF IDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants seek to reverse a secree of the Superior court, entered Earch 6, 1936. The action was commenced on July 8, 1927. The prayer of complainant's amended bill, filed October 17, 1927, is in substance that an account be taken of the dealings during a certain stated period of Friedrich Redeker and Herman F. Fedeker, (hereinafter called the two Redekers) with complainant bank, of which they then were managing officers, and of all sums wrongfully converted by them, and of all losses and damages sustained by complainant by reason of their fraudulent conduct; that defendants be held jointly and severally liable for, and be decreed to pay to complainant, whatever sums shall appear to be due to it on the taking of the account, etc. In the decree, following the meeter's report made after a lengthy hearing, the court adjudged:

"That this cause be and hereby is again referred to Louis J. Rehan, a Master in Chancery of this court, to take and state the account of the parties on all of the items, transactions, misappropriations, listed or shown in complainant's said exhibit 49 as 'hirect 'propriations,' and as 'S', 'Bl', 'C' and 'D', with lawful interest thereon, which shall appear to be due from said defendants or any of them to complainant, and to determine the amounts due complainant from the desendants, and from the complainant to defendants, if any, according to their respective liabilities; that in doing so said master shall proceed upon the findings, basis and terms of this decree, the pleadings of the



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parties and all the evidence now in the record and such further evidence as may be offered by any of the parties hereto and which shall be material and relevant to such accounting; and that said master report to this Court, with all due speed, such amounts together with such further ovidence as may be so offered and received by said master and his conclusions thereof."

In the decree the court overrules all of defendants' exceptions, and also certain of complainant's exceptions, to the master's original report (as redrafted) and to his supplemental report, and confirmed said reports. And the court made the following findings in substance.

That complainant is an Illinois corporation, doing a general banking business at Aulington Meights, Illinois; that Friedrich (also called Frederick) Redeker was the president and one of the directors of the bank from its organization in 1912 until his death in January, 1925, and from January 1, 1920 to Pecember 31, 1924, was also its cashier; that Merman F. Redeker was its secretary from January 1, 1913 to January 1, 1920, and from the last named date to January 1, 1923, its secretary and nesistant cashier, and from the last named date to about June 30, 1925, its secretary and cashier; that during all of each time the bank employed the two Redekers by the year and paid cach a monthly salary for their services as such officers; that during all of the time from January 1, 1913 to January, 1925, they, as such officers, were actively in charge of the bank, transacted all of its business affairs, had the custody and centrol of its books, records and papers, and made or caused to be made all of the entries therein; that Herman was Friedrich's son; that curing all of the time the directors and stockholders of the bank had implicit confidence in both of them, entrusted them with the management of its business affairs and with the custody of all of its books, etc., relied upon their representations, and believed that they were managing said affairs, and keeping said books, etc., in an honest and proper manner and that the entries in said books, etc., truthfully and properly represented all transactions of the bank.

That on or prior to January 1, 1918, the two Medekers engaged in a conspiracy to defraud the bank of monies belonging to it; that during a period commencing about January 1, 1918 and up to about November 30, 1984, and in pursuance of the conspiracy, they, as officers and employees of the bank, purchased for it and in its name, and from divers brokers, bonds and securities with its funds; that the prices at which the same were purchased from said brokers were falsely and fraudulently entered upon the bank's books and charged to it in amounts in excess of the true prices paid to said brokers; that they wrongfully took, misappropriated and converted to their own use the funds and manies of the bank representing the difference (in some instances a part of the difference) between the prices actually paid to said brokers for the conds and securities, and the prices at which the came were entered in the books and charged to the bank.

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for the bank by them as its officers from brokers at amounts less than the sums at which they were charged to the bank, and the difference between the actual purchase price and the amounts at which the same were charged to the bank as its books were credited to their personal deposit accounts, except that in some instances their accounts were credited with but a part of such difference; that other methods of such misappropriations are listed in said exhibit 48 under the heading of "Indirect Appropriations"; and that these so-called indirect appropriations are further classified as "B", "B1", "C" and "D".

That there is listed in exhibit 49, another classification. as Group "A", of which there are 100 items; that these are transactions in which on various dates between January 3, 1918 and June 12, 1924, securities were purchased from various brokers and paid for by drafts drawn by the bank, which drafts were paid for by checks of individual depositors of the bank; that the bonds, listed as Group "A" items. were purchased at a price less than par, and the evidence (upon which complainant relies to justify an account from defendants on these items) consists of the broker's invoice and the draft issued by the bank to the broker; that in each instance the broker's invoice runs to the bank, and contains a brief description of the bonds and the amount due (including accrued interest, if any); that the bank's books disclose that, on the respective detes of these Group "A" transactions. the bank draft in each transaction was paid for by a chack or checks drawn on individual checking accounts of depositors in the bank, but complainant offered no evidence as to the identity of the makers of these individual checks; that complainant contends that, upon its having made proof of the facts so last recited, the burden of showing the identity of the persons drawing said individual checks must be assumed by defendant, because at the time of the transactions, the two Redekers were in charge of the bank and were the custodians of its books and records; that complainant also centends that the bonds, so mentioned in the Group "A" items, were paid for with money belonging to the bank, and that the entries in its books of checks, frawn by individual depositors in an amount equal to the amount of the bank drafts, were false and fictitious, and that in fact no bene fide checks were given to or received by the bank in payment of the bank drafte; that complainant further contends that if any individual checks were given in payment of the drafts, such individual checks, shown on the bank's records, were in fact checke by either or both of the two Wedekers, and that if the checks were their or either of their checks, no money was actually received by the bank on them; that complainant admits that it is unable to offer any proof as to whose checks were supposedly given in payment of the bank drafts, but insists that the burden of showing the details of each of these transactions is upon the defendents; and that complainant does not claim that defendents, or any of them, are limble to it for the amounts paid to the brokers for these Group "A" bonds, but it does claim that defendents should account to it for the difference between the par value of the bonds and the prices at which they were respectively purchased, because the bonds involved in this grouping were subsequently charged to the bank at par, and the accounts of the two Redekers, or one or the other of them were simultaneously credited with the amount so charged to the bank, - the transactions last specified being shown in e-hibit 49 as Group "Bl".

That in said Class "B", bonds or securities were purchased from brokers at one price, charged to the bank at a higher price, and the broker's invoice in each instance was paid by a draft of the bank, which draft in turn was supposedly paid by

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checks drawn on individual checking accounts, and simultaneously with all of these details there was credited to the deposit accounts of the two Redekers, or of one of them, amounts equal to the sums at which such bonds and interest thereon were charged to the bank.

That in said Class "Bl," entries on the bank's books purport to show various purchases of bonds by it, and on the same dates there are amounts credited to the accounts of the two Redekers exactly equal to the amounts purported to have been paid by the bank for such bonds.

That in said Class "C", there are 16 items, of which one is illustrative, viz, that on July 5, 1921, the bank was charged on its books with having paid \$3,100 for certain bonds, plus accrued interest, and on the same date the draft of the bank in the sum of \$3,010.10, was drawn by the bank and paid to the firm of Bartlett, Enight & Co., in payment of its invoice of the bonds just mentioned; and the difference of \$89.90 was not credited to the bank or accounted for on its books, nor was it deposited, apparently, to either of the two Redeker's accounts.

That on January 12, 1925, Friedrich Redeker died testate, leaving a last will in which, after directing the payment of all his just debte, he devised and bequeathed all of his real and personal property to his wife, Mina Redeker, a defendant herein, "to have the full use and control of the same and use as much of the same as she may need during her natural life," and further provided that upon her death all of said real estate and property then remaining should be divided equally among Nerman F. Redeker, John N. Redeker and Eleanore Redeker, defendants herein; that on February 24, 1928, the will was duly admitted to probate by the probate court of Cook county, and Herman F. Redeker, therein nominated as executor, was duly appointed as sole executor of the will, and he qualified and thereafter acted as such; that the estate was administered, and closed on December 13, 1926, and the executor then discharged; and that said four defendants, as the only devisees and legatees under the will, received from said estate, in accordance with the terms of the will, valuable real and personal property, remaining after payment of claims allowed against said estate and costs of administration.

That suring all of the time aforesaid the two Redekers (Friedrich and Herman) sustained a fiduciary relation to the bank, its directors and stockholders, and fraudulently concealed all of their said misappropriations, etc.; and that prior to Karch, 1927, meither the bank nor any of its directors or stockholders, other than the two Redekers, had any knowledge that they, or either of them, were or had been guilty of any fraudulent conduct, or that they had misappropriated any monics or funds of the bank.

and the court further found that this action, or the recovery for any of the aforecaid items and misappropriations, is neither barred by the statute of limitations nor by reason of the fact that no claim therefor was filed against the estate of Friedrich Redeker, deceased, within one year from the time that letters of administration were granted; that the material allegations of complainant's amended bill are substantially true, and the equity of the cause is with it; and that complainant is entitled to an accounting from defendants on all the items, transactions and misappropriations listed or shown in said exhibit 49, as "hirect appropriations" and as "B", "Bl", "C" and "B", but that it is not entitled to an accounting on the items under said class "A".

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Numerous points are made by counsel for defendants as grounds for a reversal of the decree. It is first contended, inacmuch as it appears that all of the property of Friedrich Redeker was inventoried in the probate court and his estate closed in December, 1926, and as complainent did not within the required time file any claim against said estate, complainant's remedy, under the provisions of section 70 of the (dministration Act, is limited to newly discovered assets of Fried rich's estate, and it does not appear that there are any such. We do not think that section 70 has any application to the present case as disclosed from the findings of the decree, which in our opinion are amply sustained by the evidence. This is not an action against the estate of Friedrich Redeker. but one against Herman Redeker (individually and as executor of Friedrich's will) and the other heirs, devisees and legatees of Priedrich. (See Lurflinger v. Troold, 329 Ill. 93, 98; Union Trust Co. v. Shoemaker, 258 Ill. 564, 571; Waughop v. Bartlett, 165 Ill. 124, 129; Fyan v. Jones, 15 Ill. 1, 6; Straus Bros. Co. v. Bush, 241 Ill. App. 216, 228.) And it was not impreper to make Herman a party defendant as such executor, though discharged, as well as in his individual capacity. (Ryan v. Jones, supra; Moffman v. Welding. 85 Ill. 453, 436; Tinker v. Babcock, 204 Ill. 571, 574.)

Defendants' counsel also contend, innemuch as the present action was begun on July 3, 1927, and as it appears that the court directed an accounting as to certain items of claimed micappropriations by the two Redekers long prior to July 3, 1922, the decree for an accounting as to such items is erroneous because of the statute of limitations of five years. In our opinion there is no merit in the contention. In section 22 of the Limitations Act (Cahill's Stat., 1929, p. 1672) it is provided: "If a person liable to an

Numerous points are made by semmed for defendants as .bahmadaa Jauli ad di .comaab ad la famaaya a yai abmoon Manuscale on its appears that its of the property of Friedrich Sydybur mi bayala adadaa aid baa dayaa adaaa ada ai balaasaayat ana were the track of the completence of the case the recentred time PIX+ may excited main outsite, succlaiment's remely, under the nd makete at you contrapped the bill of the black of the black of and a local of her galades of all the delay. In ideas, between a five appear that there are any such. I'm do not think that section 70. but any maplications as the greater were as discipling that the crafting with the contract water of the case of the contract of the contract of the This is not in action against the calete of Friedrick feders, To make a set the limentation of the court desires one and to contaged has secretary sent the contages and lagaress of State Labe | Time | Company | Compan HA TO THE PARTY AND THE PARTY PARTY OF PERSONS AND THE PARTY OF THE PA like 1894 year wearen 13 113. It was been been to be the control of the control o 141 Tile fore the city and the set begrapes to make Detection as at as fire on elegander's flowing of the seasons are seal as in and helpfung aspective () year or demonstrated his tradition or tribing 85 111. 488, 488; Tinker v. Mahonok, 216 111. 871, 876.)

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action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has no such cause of action, and not afterwards." The evidence sufficiently shows, and as found by the court, that by affirmative acts the two Redskers fraudulently and effectively concealed from complainant, and its other directors and stockholders, the fact of the various misappropriations, etc., and that prior to March, 1927, (about four months before the present action was begun) neither complainant nor any of said other directors or stockholders had any knowledge of such missparopriations, or of the freudulent conduct of the two Redekers, and that at the various times of the misappropriations, the two Redekers sustained a fiduciary relationship to complainant and said other directors and stockholders. Thile it is the law that "the Statute of Limit tions does not strictly apply to suite in equity" (Duncan v. Essey, 318 Ill. 500, 525), still, as said in Greenman v. Greenman, 107 Ill. 404, 411, "equity generally follows the law, and denominates the period that the statute requires to ber an action, lackes, that renders a domand stale." And in equity the rule is that, "where a cause of action arises from a fraud, the Statute of Limitations will not begin to run, nor laches apply, until the discovery of the fraud. or from the time when the fraud could have been discovered by the exercise of reasonable diligence; but in the latter case the failure to use diligence is excused where there is a relation of trust and confidence, rendering it the duty of the party committing the fraud to disclose the truth to the other." (Farwell v. Great Testern Telegraph Co., 161 Ill. 522, 596, and cases there cited.) And in luncan v. Bazey, supra, it is said: "There can be no laches where there is no knewledge, and mere delay will not bar relief where the injured party was ignorant of the fraud and filed his bill within a reasonable time after acquiring knowledge of it."

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Defendants' councel further contend, inamuch as the court's finding (that meither complainant nor said other directors and stockholders, prior to March, 1927, had any knowledge of the misappropriations of the two Redekers) is based upon the testimony of four or five directors and stockholders of complainant. that said testimony was erroneously considered by the court because the same was incompetent under scatter 2 of the Evidence of (citing Consolidated Ice Machine Co. v. Reifer, 134 Ill. 481, 496; Alberg Commission Co. v. seecl. 193 Ill. 155. 155.) e de net think there is any substantial merit in the contention. There is other competent testimony in the record showing lack of knowledge in complainant and said other stockholders of said misappropriations prior to March, 1927. Furthermore, the testimony complained of was competent as against the defendant. Merman Redeker, in his individual capacity, and was competent against the defendants, Mina, Eleanore and John Redeker (heirs, legatees and devinees of Friedrich Redeker) as to facts occurring after Friedrich's death. (Sub. Sec. first of Sec. 2, Evidence Act: Griffin v. Griffin, 185 Ill. 430. 434), and could not properly have been excluded on defendants' motions. (Nich v. lievers, 73 Ill. 194, 196.)

Equally without scrit, in our opinion, is the further contention that the court erred in confirming the meeter's rulings on the hearing in admitting certain testimony of some of complainant's witnesses as to certain admissions of liability to complainant made by Herman Redeker, at a meeting in June, 1927, held at the office of I. V. Laurin (complainant's expert accountant) for the purpose of negotiating a possible settlement or compremise of complainant's claim. In Them v. Hess. 31 Ill. App. 274, 276, it is said: "Offers of compremise do not bind; but admissions or statements of the facts are evidence, though made in an endeavor to effect a settlement." (See

adi sa dagunani (buckato vedivel lecano "sinchetta" equipment comes after the reactionness continue canno quantity process and creekholders, prior to March, 1927, had any haseledge of the stantified our maps bloom an immediatel and our he assistating opposite . Just . Inculationed to evablorhiods has another all and the that to anis termony was erruneteely conclused to the confined galdin) dat sombive and to I molless tolow these . . . and the transfer of the transf STAR Jan on at (and a star old old allowed at any polarisms) maile at staff analyzed the said at diven interesting one of weed. competent continent in the record charing lack of knowledge in queitnorquanta bion to erobicides padro bion bur duminiques ... In test always countries and armonolists; a This alcredi of matry and of animals among the definition of teniers are desired and indiction, sometime on a competent around the defecteding Mines Manages on Join Leavest (Asing pagetons and Creigens at Friedring terior in the second of the se enth and the sent that the manager of the first "nanohniteh ne behalese med prod cleaning des hünes bis glada ambions. (Mah w. Mewros 75 731s 194s) 196s)

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elso 1 Green). on My. 13th ed., sec. 192; 22 Corpus Juris, p. 315, sec. 349; Kuhn v. Williams, 124 Ill. App. 390, 593.)

Defendants' counsel further contend that the criminal acts. as charged against the two Medekors in the amended bill, were not proven beyond a reasonable soubt. This is a civil action for an accounting. The substance of the charges is, and the court found. that the two Redekers as the managing officials of complainant bank ontered into a communicacy to defraud it out of certain monies and consumnated their conspiracy and did defraud it during a certain period by means of certain acts performed by them. In the earlier decisions of our Supreme Court it has been held that where, in a civil case, a "criminal offense" is charged in the pleadings, such offense must be proved beyond a ressenable doubt. (Germania Fire Ins. Co. v. Klewer, 129 Ill. 599, 612; McInturff v. Insurance Co., 248 Ill. 92, 99.) But in the comparatively resent case of Yout v. Noble & Co., 316 111. 367, 572. it is said: "The rule is universel that in criminal prosecutions the evidence must satisfy the jury of the truth of the charge beyond a reasonable coubt. In general, where civil rights only are involved, the decision must be upon the prependerance of the evidence. The Anglish rule, where the insue is upon a charge of crime made in the pleadings and necessary to be proved to maintain the action or defense, was followed in some of the States but has now generally been abandoned. * * The resson in which the rule seems to have had its origin is applicable only to cases where the charge was of a felony, and in general it is in such cases, only, that the rule has been applied. It will not be extended further but is limited to charges of felony." (See, also, Cooper v. Mutt, 264 Ill. App. 445, 460-1; People v. Teall, 319 Ill. 437, 481.) In the present case we think that the accounting which was prayed for and decreed has for its basis the compatracy or misdomensor, committed by the two hedekers. And we also think that the syldence contained in the present record, as was

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ants' counsels' further contention that the decree is erroneous because being based largely upon complainant's exhibit 49 and certain testimony of the expert accountants, Laurin and Berman, who made certain compilations or schedules from complainant's books and records. The documents from which the compilations were made were in evidence and the mitnesses were fully cross-examined. In <u>Le Roy State Bank v.</u>

<u>Heenan's Bank, 337 Ill. 173, 101, it is said: "There the originals consist of numerous documents, beaks, papers or records which cannot conveniently be examined in court and the fact to be proved is the general result of the whole collection, any competent witness who has examined the originals may testify as to such result, provided it is capable of being ascertained by calculation." (See, also, Feaple v.

<u>Gerold, 268 Ill. 448, 460; People v. Sawhill, 299 Ill. 393, 403.)</u></u>

argued that the court erred in not finding and decreeing that defendants should account (1) for the items in said Class or Group "A", and (2) for the salaries paid by complainant to each of the two Redekers "during the time they perpetrated said frauds against it." As to the first contention, after considering the evidence and the arguments of respective counsel thereon, we are of the opinion that the court did not err in denying the accounting as to said items. As to the second contention a sufficient answer is, we think, that in complainant's amended bill it was not sought to recover back any portion of the salaries which had been paid to the two Redekers in the ordinary course of business as officials of complainant.

Our conclusion is that the decree of March 6, 1930, appealed from, should be affirmed and it is so ordered.

Soundan, P. J., and Merner, J., concur.

saidin the accounting case of Fragic ve halls supress beyond all rescensia dealts, a limbility to account? on the part of the defendants haveins

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For conclusion to that the dogmen of March of 1980, appended from, should be affirmed and to is so ordered.

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SHERIDAN BLECTRIC RIGHTSERVICE,

Plaintiff in Error,

VB.

SAN KERBAN. Defendant in Error. BRBOR TO MUSICIPAL COURT OF CHICAGO.

201 I.A. 639²

MR. JUNTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in contract to recover the sum of \$1250, there was a trial without a jury in January, 1929. resulting in the court finding the issues against plaintiff and entering judgment against it for costs.

In plaintiff's statement of claim it is alleged in substance that it was duly organized as an Illinois corporation in March, 1923; that defendant was one of its incorporators and subscribed for 25 shares of its capital stock of the par value of \$50 per share, --his subscription being for the total sum of \$1250; that during march, 1928, plaintiff issued to defendant its certificates of 25 shares of its stock; that defendant never paid for his subscription or for the stock in money or maney's worth; and that he is indebted to plaintiff is the sum of \$1250.

In defendant's affidavit of merits he admitted that he had subscribed for the stock and had received from plaintiff two certificates, aggregating 25 shares of its stock, "fully paid and non-assessable;" denied that he had not fully paid for the stock in money or money's worth, or that he was indebted to plaintiff in any sum; alleged that at a duly authorized meeting of plaintiff's directors, held in Baron, 1928, he turned over to it, in payment of his subscription for the stock, an undivided one-half interest in and to a certain co-partnership, of which he was a member, and the assets thereof; and that plaintiff at said

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180 per chare, whis subscription being for the total sum of 1120;

that during March, 1923, plaintly issued to defendant the certi
Tionics of 25 chares of its stock; that defendant never paid for the subscription or for the stock is known or succepts worth; and that sais is incoded to glaintiff in the own of 11250.

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the had subscribed for the other had received from plaintiff the continuation of the had not fully paid for the third one that it had a salp authorized meeting of the plaintiff a director, held in hardh, 1923, he turned over to it, in payment of his enbearication for the stock, an undivided one.

meeting accepted said one-half interest and said assets in full payment of defendant's subscription, and has since retained the possession thereof.

On the trial the testimony of defendant, supported by certain documentary evidence and corroborated by the testimony of two other witnesses, tended to suctain the defense as stated in the affidavit of merits. There was no evidence to the contrary introduced by plaintiff. We think it clear from the evidence that the finding and judgment of the court were right. It is urged by plaintiff's counsel that defendant's evidence as to the valuation of the property and assets turned over to the plaintiff corporation in payment of defendant's subscription and of the stock, shows such valuation to have been excessive. Even if this were so, it is not a matter of which plaintiff can complain. It formally accepted said property and assets in full payment of defendant's subscription and of the stock issued to him, and such acceptance is binding upon plaintiff, and as between it and defendant the latter's stock subscription must be considered as fully paid. (Parmelee v. Price, 208 Ill. 544, 554.)

The judgment of the municipal court is affirmed.

AFFIRMED.

Scanlan, P. J., and Kerner, J., concur.

nesting accepted said cas-bell interest and assets in full payment of defautent's subscription, and has since retained the

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JOHN WHARDT and MATHIAS WHARDT.

Plaintiffs in Error.

SPACE TO MUNICIPAL

COURT OF CHICAGO.

V.

MAN BUGARMAN.

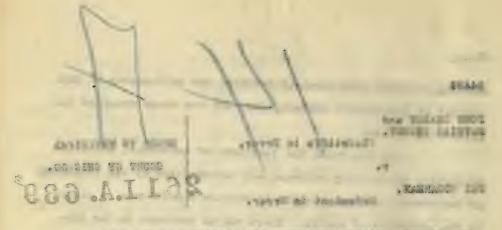
Defendant in Error.

WA. JUSTICE CRIDLEY DELIVERED THE OFFICE OF THE COURT.

In a 4th class action in contract, commenced in November, 1924, there was a second trial without a jury, in June 1928, resulting in the court finding the issues against the plaintiffs, and entering judgment on the finding against them for costs. By the present writ of error they seek to reverse the judgment.

from a judgment in favor of the then sole plaintiff, John bhardt, for \$450, rendered upon the versict of a jury. That judgment was reversed on october 4, 1927, and the cause remended. (Thardt v. Lugarman, 245 Ill. App. 625.) He mention is made in the brief of counsel for plaintiffs in error of these former proceedings, and the present practipe record does not show any proceedings prior to key 3, 1928, when the mandate of this court was filed in the municipal court and the cause there redocketed.

As appears from our former opinion (unpublished), plaintiff on the first trial claimed in substance that in May, 1924, he and defendant entered into an oral contract, whereby he, who then was defendant's tenant of certain premises at 651 North avenue in Chicago, agreed to surrender the possession thereof on June 1, 1984, and defendant, in consideration thereof, agreed to



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As appears from our former spinion (unpublished), plaintif on the first trial claimed in substance that in May, 1834, he and defendant entered into an area contract, whereby he, who then was defendent's tenent of certain premises at 851 Marth avenue in Chicago, agreed to surrender the passonalon thereof on

return to plaintiff \$450, theretofore delivered to defendant as a deposit for the rent of the premises for the last two months of the term of a certain written lease; that plaintiff surrendered the premises, but that defendant sid not keep the agreement and refused to pay to plaintiff said \$450. Defendant's defense on the said first trial was in substance that he never made any such agreement with plaintiff; that plaintiff's tenency was one from month to month in the conducting of a restaurant business on the premises; that about June 15, 1984, he abandoned the premises and for the reason that he was "losing money in the restaurant business;" and that defendant was not indebted to plaintiff in any sum. It further appears from our former opinion that the verdict and judgment for \$450, rendered upon the first trial in favor of plaintiff, were not outstained by the evidence, and for that reason the judgment was reversed and the cause remanded.

After the cause was redocketed in the municipal court. on John Ehardt's metion, Mathias Thardt, his brother, was made a co-plaintiff with John, and they as plaintiffs on May 4, 1028. filed a second amended statement of claim, which disclosed a different theory of right to recover the \$450. In said statement of claim they alleged in substance (1) that on leptember 3, 1928, defendant, then the owner of the premises, demised them by written lease to one Jacob indree, for a term commencing October 1, 1922. and ending on September 30, 1925, and that when the lease was signed Andree deposited with defendant \$450, as security for the rent for the last two months of the term (August and Meptember, 1925); (2) that during January, 1925, Andree assigned said lease to one Martin Krispin by written a saignment; (3) that on May 9, 1923, by agreement between defendant and Arispin, the latter's "leave and tenancy became and were terminated," and plaintiffs (John and Mathias "hardt) "became and were tenants of the premises by the agreement and consent return to plaintiff itais, theretailore delivered to defendant ac a deposit for the reat of the premises for the last two months of the tens of a serm of a servicia written lease; that plaintiff surrendered the premises, but thet defendant tid not been the agreement and reluced to you to plaintiff and felt. Infendant's defence on the said first trial and to substance that he never ands any such agreement in the convecting of a restaurant business on the greatest that he had been looked the granises and for the renormal that he was "looked meany in the restaurant business;" and that defendant has not independ the first in any sum. It further appears from our former opinion that in any sum. It further appears from our former opinion that the restaint and judgment for appears from our former opinion that in any sum. It further appears from our former opinion that in saver of plaintiff, even not suctained by the evidence, and for that re con the judgment was reversed and the order and the cause remembed.

After the cours and redocked in the aunicipal court. and a metion, Nathias Chardt, his protier, was made a co-plaintiff with dolar, and they as plaintiffs on May 4, 1923, filed a second caracad atatoment of claim, sitch disclosed a different theory of vight to vocover the biddle. In sold atutumate of ciria they alleged in seintance (1) that on teptember & 1922. STATE OF STATE OF STATE OF THE PARTY ASSESSED. SON TO THESE WIT MANY ASSESSEDANT lesse, as one from mirely yet a long communities of other ty letter. and ending on Depender 50, 1985, and this view the least was algori CHESAN CHARACTER LENGTH 442-00-00 1420 AN INCIDENTAL TRA-TRA-TRA-TRA-TRA-(I) g(2001 - radiates of the term (huged and he radiates 1905), (I) midted one of each bine hearites series and great trans intro fall Erlapin by written a salement; (3) cart on May 9, 1925, by agreement between defendant and Bringle, the Lebberts "leave and templey became and were bereinstee," not plaintiff (dolo med Meshins bards) fusion but from the real reasons and to advant and areason

of defendant" (it is not stated what was the character of that tenancy); (4) that on August 30, 1923 (i.e., more than three months after Krispin's lease and tenancy had been terminated), Krispin, by an instrument in writing, assigned to plaintiffs "his said lease-hold and all rights thereunder;" and "plaintiffs became and were the actual, bona fide, owners thereof;" (5) that on June 1, 1924, by agreement between defendant and plaintiffs, the latter's tenancy in the premises "was terminated"; and (6) that "by reason of the foregoing matters," defendant is liable to pay to plaintiffs said sum of \$450, etc.

In defendant's affidavit of merits, filed May 15, 1928, setting forth his defense to plaintiffs' said different claim, he admitted the allegations as contained in paragraphs 1 and 2 of said second amended statement of claim. As to the allegations of paragraph 3, he admitted that on May 9, 1923, the lease to Andree, which had been assigned to Krispin, was terminated, but alleged that thereafter John and Mathias Bhardt (plaintiffs) became tenants of the premises "from month to month and not by virtue of any lease." As to the allegations of paragraph 4, defendant denied that either on August 30, 1923, or at any other time Krispin assigned his lease of the premises to plaintiffs, and stated the fact to be that "plaintiffs refused to accept an assignment of said lease and refused to be bound thereby." As to the allegations of paragraph 5 of plaintiffs' statement of claim, defendant somied that on June 1, 1984, by his agreement or consent, plaintiffs' tenancy and terminated, and stated the fact to be that en or about June15, 1924, plaintiffs abandoned the premises. and defendant denied that he was indebted to plaintiffs in any sum.

On the trial it appeared from a clear preponderance of the evidence that the allegations in defendant's said affidavit of merits were true. It further appeared that after plaintiffs' abandonment of the premises defendant made unsuccessful attempts to obtain of defendent" (it is not abated what you the character of that tenancy); (4) that on August 30; 1973 (i.e., more than three menths and and all rights thereunder;" and "plaintiffs boosey and were the actual, been therefore thereoff" (f) that ou June 1; 1024, by actual, been fide, owners thereoff; (f) that ou June 1; 1024, by the president and tenance of the Limits. The Limits of the foreign tenance of the form

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morite were true. It further sy, warme that after plaintiffs' abandon-

another tenant and that the premises were not occupied during the months of August and September, 1925.

On the trial also plaintiffs, over defendant's objection. introduced in evidence a certain bill of sale, dated agust 30, 1923. wherein Krispin sold to them certain restaurant furniture, fixtures. etc., on the promises, together with "leasehold and all rights thereunder, as well as all liabilities." . nd plaintiffs' councel here contend that because of this instrument, and the other facts as shown, plaintiffs are entitled to recover of defendant the \$450 which defendant received from indree, as a deposit and as security as stated. when endree originally signed the leave in 1922. There is no merit in the contention. If the tenuncy of Krispin, assigner of the indree lease, had before the and of the term of the lease been terminated, against the consent of Krispin or by the fault of defendant (lesser). Brispin might have/a claim to recover back from defendant said deposit. But the evidence shows that Erispin wented to get rid of the assigned lease before the end of the term. And there is no evidence that Krispin ever claimed that he, as assigned of Andree, was entitled to recover back said deposit. Furthermore, the evidence shows that about the time said assigned lease was terminated, plaintiffs would not accept/further assignment to them of said leave, or agree to become bound by its terms, but that they did become tenants of the premises from month to month by a new arrangement with defendant, - a tenancy not connected with the former Andree-Krispin lease.

Under the pleadings and the facts as disclosed from the evidence we are of the opinion that the judgment in question in favor of defendant was clearly right and should be affirmed. Nuch will be the order.

AFFIRMED.

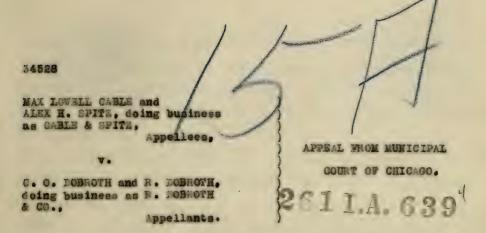
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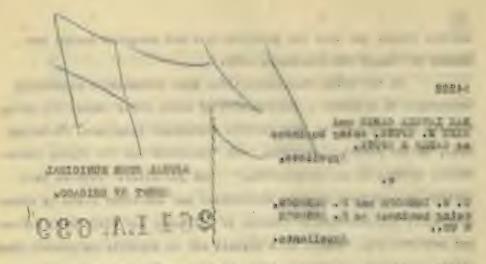
dendans f. J., pro Merner, J., concur-



MR. JUSTICE OF INLAY DELIVERED THE OPINION OF THE COURT.

In a fourth class action in contract to recover for services rendered by plaintiffs as licensed architects, there was a trial without a jury in April, 1930, resulting in the court finding the issues against defendents and assessing plaintiffs' damages at the sum of \$585, the full amount of their claim. Judgment on the finding was rendered against defendants in said sum and they appealed. Plaintiffs have neither enteres their appearance nor filed a brief in this court.

Witness for them. Plaintiffs' evidence disclosed in substance, as alleged in their amended statement of claim, that in March, April and May, 1929, they were licensed architects in Illinois, practicing their profession in Chicago; that in March, 1929, at the request of both defendants they prepared, drafted and delivered to exfendants sketches and plans for an apartment building to be erected on a lot on Aimball avenue, just north of Hollywood avenue, Chicago; that the reasonable value of their services in preparing and drafting said sketches and plans is \$455; that in April or May, 1929, at the further request of both defendants, they prepared, drafted and delivered to defendants preliminary sketches for another apartment building to be



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crected at the northeast corner of Gullom and Ashland avenues.

Chicago; that the reasonable value of the services in preparing and drafting said last mentioned sketches is \$130; and that defendants are indebted to them in the aggregate sum of \$585 - no part of which has been paid.

In defendants' amended affidavit of merits they did not allege that plaintiffs had not performed the services as stated, or that the reasonable value of the same was not as states, or that plaintiffs were not at the times mentioned licensed architects. Their defense was in substance that plaintiffs under the oral agreement were not to receive anything for their services unless certain clients of defendants accepted said plans and sketches, in which event the clients, and not defendants, were to pay plaintiffs for their work.

On the trial, to sustain the defense, both defendants and another witness called by them testified. But it is clear to us, after reading their testimony, as well as certain testimony introduced by plaintiffs in rebuttal, and after considering all the evidence, that the defense was not sustained, and that the trial court properly made the finding and entered the judgment in question.

Defendants' counsel also here contend for the first time that the judgment should be reversed because (1) it does not sufficiently appear that at the time plaintiffs service were rendered both of them were licensed architects and (2) there is a fatal non-joinder of a party defendant, to-wit, one Edward W. Dobroth, who, it is claimed, was a member of defendants' firm of R. Lobroth & do., when plaintiffs' services were solicited and performed. In our opinion neither contention is warranted by the evidence. Furthermore, as to the second contention, it sufficiently appears that the oral agreement sued upon was made with plaintiffs by C. O. Dobroth and R. Bobroth, defendants.

The judgment of the municipal court should be and is affirmed. Scanlan, P. J., and Kerner, J., concur.

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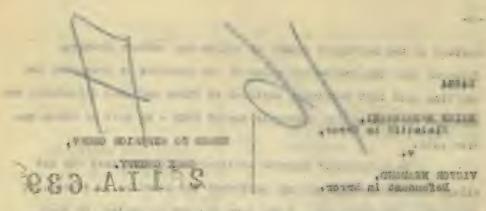
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M. JUSTICE ONIDLEY DELIVERED THE SPINIOR OF THE COURT.

In an action for damages for personal injuries received by plaintiff in an automobile accident early in the evening of august 1, 1928, there was a trial before a jury in February, 1930, resulting in a vertict and judgment in favor of defendant. By this writ of error plaintiff seeks to reverse the judgment.

Theirtiff alleged in her declaration in substance that on the evening mentioned defendant was driving his automobile at a dangerous rate of speed, northerly in dicero avenue, Chicago, automoting to cross hoscoe street (an east and went street); that at the same time she was riding, with all due care for her own safety, with her husband and others in another automobile owned by her husband; that her siner son was griving said last mentioned automobile with due care and caution staterly on forces street and attempting to cross dicero avenue; that defendant so negligently operated his automobile that it ran into the automobile, in which plaintiff was riding, in the intersection of said two streets, and that as a result of the collision she suffered serious and permanent injuries, etc. Defendant pleaded the general issue.

On the trial such testimony was heard. Flaintiff testified in her own behalf and she called as witnesses her said son and two other occupants of the car in which she was riding. They all gave their versions of the accident, as did sucther of her witnesses.



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by plaintiff in an automobile accident early in the evening of in the line of the orening of resulting in a vertice and judgment in favor of secondant. By this artis of sever plaintiff goods to reverse the judgment.

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other occupants of the car in which the vertiling. They all gave
thelr vertilens or the advident, as did another of her vithercos.

Emil C. Tchmid, a bystander. Dr. Comes, a physician, also testified for her as to the extent of her injuries and his treatment of her in a hospital. Defendant also testified and he called as witnesses for him George Lomax and Bernard Lemke, who were in a third automobile following defendant's at the time of the collision.

The main contention of plaintiff's counsel is that the verdict and jusquent are manifestly against the weight of the evidence. This contention need not be considered by us. It does not appear from the bill of exceptions that any motion for a new trial was made by plaintiff or that the trial court made any ruling on such a motion. In <u>People v. Sabrya</u>, 320 Ill. 101, 102-5, it is said: "In order to bring before this court for review the question of the sufficiency of the evidence to sustain the verdict it is necessary that the losing party make a motion for a new trial and upon its being over-ruled except as to such ruling, and to include such motion, the order overruling the same and exceptions thereto, together with the evidence, in a bill of exceptions." (See, also, Yerber v. Chicago and Alton By. Co., 235 Ill. 539, 597; uillman v. Cockram. \$53 Ill. App. 413, 414.)

It is also contended that the court erred in giving defendant's instructions, Nos. 3, 4 and 7. The instructions given by the
court to the jury are not set forth in the abstract, and, hence, the
contention need not be considered by us. Even where complained of
instructions are contained in the abstract but other given instructions
are not set out therein, such complained of instructions may not be
considered. (Briggs v. Page, 222 Ill. app. 223, 227; City of Roodhouse
v. Shristian, 188 Ill. 187, 141; Feeple v. Heywood, 321 Ill. 389, 384.)

It is further contended that the court erred in refusing to admit in evidence certain I-ray pictures of plaintiff, offered by her. It is not disclosed from the bill of exceptions that said pictures, when offered and objected to, had properly been identified

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for her as to the extent of her injuries and his trackment of her in
at degree Lomes was Bernard Lombs, who were in a third sutencile

The mein convenient of plaintiff's comment to the the velverality and include the relief the sylveration and incompliant the restance by us. It does not appear from the bill of energitons the say notion for a new trial was make by plaintiff or that the trial court made any ruling an auch a motion. In copie v. Gabrys, 539 111. 101, 102-5, it is eater "In order to bring before this court for review the question of the cutiff- order to bring before is suctoin the review that the return of the auction is suction for an accuracy that the relief energy court return the same and exceptions their and upon its being every value court to save and exceptions thereto, together with the evidence.

It is turkness contended that the court errod in refusing to admit in evicence acreats derry pletures of plaintiff, affered by her. It is not disclosed from the bill of exceptions that only pletures, when affered the last property bean identified

or proved, and the court did not err in the ruling. (<u>*tevens v.</u>

<u>Illinois Central R. Co., 306 Ill. 570, 575; icks v. Cuneo-</u>

<u>Henneberry Co., 319 Ill. 344, 348.</u>)

The judgment of the Superior court is affirmed.

Scanlan, P. J., and Merner, J., concur.

Table of the control of the control

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34566

JOHN WESTHOOD,

Defendant in Brrow

V.

ROSE BODINGTON,
Plaintiff in Error.

cook county.

MR. JUNIOU GAIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error Nose Bodington seeks to reverse a decree entered by the Superior court on May 7, 1930. This is the second time the case has been before us. No certificate of evidence is contained in the present transcript.

The action was begun on June 26, 1984. An amended bill for an accounting was filed on December 13, 1925, in which complainant prayed inter alia that defendant be ordered to return ten certain shares of stock, or to pay to him the fair market value thereof, with legal interest thereon, from April 20, 1984. After answer filed there was a hearing before the chancellor, at which both parties introduced evidence. In February 20, 1626, the court entered a decree directing that she pay to complainant within 20 days the sum of \$2650, with legal interest from April 20, 1924, to Pecember 16, 1925, and costs of suit, and that in default of such payment execution issue, atc. In the decree the court found that the parties entered into an agreement to purchase certain real estate in Oak Park, Illinois; that the ten shares of stock then were owned by estwood, and he transferred the same to Mrs. Bodington "as security" for the making of the initial payment for said real estate; that subsequently she rescinded the agreement of purchase and converted the stock to her own use; that its value at the time of the canversion was \$2660; that she is still in possession thereof and

a dedres entered by the Superior court on May 7, 1950. This is
the second time the case has seen before us. No certificate of
evidence is concined in the present transcript.

the setten was begun on June 26, 1824. In amended bill for an accounting one filed on becamer lt. 1925, in which complaiment prayed inter alia that defendent be ordered to return ten deries in shares of stock, or to pay to him the fair market value Courself, still light talebeed through from the lift, 1944, 1848, 1848; seemen files energ was a hearing before the chancellar, at which is the course of the course of the course its and the course entered a decree directing that am pay to acoptain attain 20 days the sum of tideso, with legal interest from April 10, 1824, to found to timeted at their man to other ham their of todayers! gaynest encousing tasks, esc. in the decree the court found that picies insu minimo sendoung or unamoura an auni teresas salivas adi in Onl Park, Militales time ten near on a coak then sere sund by 'cathood, and he transferred the some to Mrs. Botington has security" for his making of the initial payment for soid real country besternes has eaudorug to savarouge and bebaloos win allowependen and -not said to said and in sular sol & do take and the red of doors and bno beareds meiasonees at Illian et and sould tonoche any meiarcy refuses either to return the same or to account to him for its value; and that he is entitled to legal interest on the sum of \$2.650 from april 20, 1924, to becomber 16, 1925. Whe appealed to this court, and on March 29, 1927, we reversed the decree and remanded the cause "with directions for a modification of the decree" as outlined in our opinion (not published). (*estwood v. Bedington, 244 Ill. App. 640.) The application for a writ of certioreri was denied (244 Ill. App. p. xviii.)

In the opinion we said that the main fact in controversy was whether, at the time the stock was transferred to defendant, there was any such agreement between the parties as contended by complainant; that on the herring complainant, as well as his son, Tracy, and the latter's wife (who claimed to be present at the time of the conversation about the purchase), testified that there was such an egreement, and that defendant and her daughter (who also claimed to be present at such conversation) testified that no such sgreement was made, and that the stock had been "given" to defendant in accordance with complainant's previously expressed intention; that whether there was such an agreement or such a lift depended entirely upon the chancellor's view of the credibility of the witnesses; that "as he had a better opportunity than we for determining their credibility we find as go d reason for questioning the correctness of his conclusion that there was such an agreement and that the stock was assigned to her to be held as collateral, and not as a gift;" that complainant was antitled on his demand made on April 20. 1924, either to have the stock resestinged to him by defendant, or, upon her refusal so to do, to receive its maket value as of that date; that the decree is not, however, in such alternative, but orders defendant to pay to complainent within a certain time the sum of \$2650, etc., without giving defendant the opportunity of

refuses sither to reburn the same or to account to him far the valves ord that out valves and that and that he is custiful to legal anterest on the ours, and en unred CS. 1927, we reversed the deares and remanded the same "with directions for a modification of the dearest as a sublimed is our apinton (not published). (setweed v. Bedington, the Latestication for a veit of certioners and desired (see the tile the account to desired (see the tile the account).

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reassigning the stock to him; that solely on account of this error the decree should be reversed and the cause remanded with directions to the court to make a proper modification in the decree; and that such modified decree should direct that defendant should reassign and deliver the stock to complainant, or, upon her failure so to do within a specified time, that she pay to him the value of the stock with interest, etc., together with the amount of dividends received thereon.

It thus appears that this court in effect affirmed the former decree of the Superior court of February 20, 1926, as to the issues between the parties, and only directed its proper modification.

After the cause had been redocketed, the Superior court on July 3, 1927, in accordance with the mandate, entered a modified decree in which it ordered that defendant reassign and deliver to complainant seid ten shares of stock within 5 days, and that in case of her failure so to do she pay to him within 10 days thereafter the sum of \$3650, together with legal interest from April 23, 1924, to June 28, 1927, and also pay the further sum of \$100, received by her as dividends OR the stock.

on January 30, 1930 (after more than two years had passed) complainant filed a petition in the cause alleging that defendant had failed to comply with the provisions of said modified decree, either by reassigning the stock or paying said sums. He prayed for another decree *making said judgment final for the total sum of \$3426.95." beforeant filed a lengthy answer to the petition, and complainant a replication.

on May 7, 1930, the court entered a further decree, finding that defendant has failed and refuses to reassign to complainant said ten shares of stock, mentioned in the decree of July 8, 1927, that she also has failed and refuses to pay to him said sum of \$2650, with interest from april 20, 1924, that she also has failed and reremealpring the stock to him; then solely on account of this error to the court to make a proper medification in the duorse; and that the court to make a proper are followed and deliver the woods to completenant, or, upon her followe no to do within a specified vise, that che pay no aim the value of the chock with interest, etc., tagether with the chount of dividends received with interest, etc., tagether with the chount of dividends received

It thus appears that this court is office affirmed the formed the formed for the fire depositor accurt at Nobreaux 20, 1886, 45 to the formed formed the worst to the court to

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that she also has failed and refuses to pay to bis seid aum of 18650,
with interest from agril 20, 1844, that the slee has failed and re-

fuses to pay to him the further sum of \$100 as accrued dividends on the stock, and that there is now due to him from her the total sum of \$3426.90, together with costs, etc. And the court ordered and decreed that a "final decree" be entered against defendant, in favor of complainant, for \$3426.90, and that execution issue, etc.

Defendant's counsel, in urging the reversal of the decree of May 7, 1930, questions the jurisdiction of the court, as a court of equity, to enter it. Thile not objecting to the amount of the decree, he argues that it is merely one for the payment of money and that defendant is entitled to a jury trial in a law court, etc. In our opinion there is no merit in the point. A proper case for equitable relief was shown in complainant's amended bill and after a full bearing the court decides that the ten shares of stock of the value of \$2650, in the peasession of defendant belonged to complainant and should be returned to him, or, if not returned, that defendant should pay to him said sum of \$2650, together with certain interest and the amount of certain dividends received by her on the stock. That decision, as evidenced by the original decree of February 20, 1916, was in effect affirmed by this court, though the cause was remanded for the saking of a modification in the decree. After the properly modified decree of July 8, 1927 was entered, it appears that defendant failed and refused to return the stock to complainant. Under the decree of July 8, 1927, which we consider a final one, it become an adjudicated fact that defendant, having failed to return the stock, oved complainant said sum of \$2650, interest, etc., and \$100 for dividends received. The decree of May 7, 1930, is based upon the decree of July 8, 1927, and it determined the total amount of defendant's indebtedness to complainent as of its date. and we regard the errors assigned on the record, and counsel's further points, as an attempt to re-

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The decree of the Superior court of May 7, 1930, should be affirmed and it is so ordered.

AFFINMED.

Scanlan, P. J., and Kerner, J., concur.

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APPENDING.

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34573

HARRY ENGLESTEIN, Plaintiff and Appellee,

V.

IR. SIMMONS C. HAMILTON and IR. CLARENCE H. PAYNE, Defendants.

On appeal of DR. SIMMORS C.

appellant.

APPEAL FROM
MUNICIPAL COUNT
STICHICAGO.

2611A610

MR. JUSTICE CHIDLINY DELIVERED THE OPINION OF THE COURT.

on November S, 1929, a judgment by confession for \$466.49 was entered against the two defendants for rent, etc., claimed to be due on a written lease. On March 10, 1930, on section of one of the defendants (Dr. Hamilton), the judgment was opened and he was given leave to file an affidavit of merits, which was filed as well as his written demand for a trial before a jury. On spril 30, 1930, auch a trial was had, and at the conclusion of defendants' evidence, the court directed the jury to return a verdict, finding that at the date of the rendition of the confessed judgment there was due to plaintiff from said defendants the sum of \$383. The jury returned such a verdict and on May 3, 1930, the court adjudged that the confessed judgment be reduced to the sum of \$383, and that the same, as so reduced, stand confirmed, etc., against both defendants as of the date of its rendition. From this judgment the defendant, Dr. Hamilton, appealed.

A copy of the lease was attached to plaintiff's statement of claim and the original lease, dated spril 11, 1928, was introduced by him on the trial. By it plaintiff demand to defendants (naming them), as "lessee", the office space on the third floor of the building on the southeast corner of 47th street and South Parkway.

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Whitehit not colours be followed, it all the thousand an of of bominio a see a few for manufacture in a community of the see dye on a writing later. On Reigh LO. 1900, on mether of one of the defendents (Fr. Hantlion), the sudiment was council and he was given leave to file an affidevit of merits, which was filed as well as leave ment where a market between the array of a second s a trial was bad, and ut the conclusion of defendents' evidence, the court that the dark to return a vordict. Italing that the date This make of the carries and the application of the solither and to .0809 le mue est asmebneleb blee moul The jury returned and a became and the bid is 2000, the court adjudged that the bid to or on come out that han a that to mue out of nonhor of fanghat ond to an administration described in the contract of the date of its readition. From this judgment the defendant, Ir. Abdirman american

A copy of the straint to place were ablacted to plaintiff a stranged of claim and the ariginal leave, dated april 11, 1988, was introduced by him on the trial. By it plaintiff demined to defendants (naming them), or "leaves, the affice opace on the third floor of the build-ing on the southernt corner of 47th street and louth Parkery.

Chicago, described as offices numbered 514, 316 and 318, * * to be occupied for dentist's and physician's offices. The term of the leave was from April 1, 1928, to April 30, 1930, and the stipulated monthly rental was \$138, to be paid in advance on the first day of each and every month. By a clause in the leave the lessor (plaintiff) "agrees to furnish steam heat as per the minth paragraph," in which paragraph it is provided that "Lessor shall furnish to Lessee in the radiators a reasonable amount of hot water heat or steam heat at reasonable hours, if the weather and temperature require it, from the lat day of October until the 30th day of April of the succeeding year for the use of the Lessee, except when prevented by strike," etc.

the amount of the confessed jusquent was made up of a balance of rent claimed to be due for the month of September, 1929, \$107; rent for October, \$138; and rent for November, \$138. These items aggregated \$383. In addition there were items aggregating \$23.49, for water tax and electric current, and \$60 for attorney's fees. These last mentioned items were waived by plaintiff on the trial, but plaintiff made proof that at the time the judgment was confessed there was due under the lease for accrued rent said aggregate sum of \$383.

In Dr. Hamilton's affidavit of merits he admitted the execution of the lease and the occupancy of the demised premises by him and his co-tenant for a portion of the term. And he alleged that on some occasions, "to-wit, all of the months of November and December, 1928, and January, February, March and April, 1929," plaintiff failed to furnish sufficient heat to the premises; that "in January, 1929," after receiving notice of insufficient heat, plaintiff "cut through the wall and ran an exposed steam pipe through affiant's operating room," against affiant's consent,

Chicago, described as officen numbered 114, 116 and 112, 4 a to be scoupied for dentiates and physician's offices. The term of the lease was from agril 1, 1900, to April 30, 1830, and the stipulated menthly rentel was [123, to be paid in sevence on the first day of each and every menth. By a clause in the lease the paragraph," in which peregraph it is provided that "Lessor chall counts to Lessoe in the redictors a rescentile assemt of het water areas it, from the lat day of Detober until the 30th day of April 10 require it, from the lat day of Detober until the 30th day of April 2010 the succeeding year for the wee of the Lesses, except when

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eneration of the Lease and the occupancy of the demised promises by him and his co-teman for a partien of the term. And he alleged that an abad occusions, "to-out, all of the months of Formber and bedeen 1918, and do unry, Pebruary, Errch and April, 1919," plaintiff failed to termish sufficient head to the premises that "to Jamuary, 1929," after receiving notice of insufficient heat, or the receiving notice of insufficient heat, and the state of the state of the state heat, and the state of the state of the state of the state of the state heat, and the state of the st

whereby on some occasions, "to-wit, during all the months of Pebruary, March and April, 1929," the heat in the offices was "unbearable"; and that because of his "constructive eviction" he finally vacated the promises "in July, 1929," and is not indebted to plaintiff in any sum.

To austain his defense of constructive eviction. Dr. Hamilton testified on the trial, and he called several other witnesses, including its co-defendant, Dr. Payne. The testimony of these witnesses discloses the following material facts in substance: On occasions during the months of December, 1928, and January, 1929, there was insufficient heat in the offices, and, upon complaints made, plaintiff endeavored to supply additional heat by putting in one of the offices another, and exposed, herting pipe. During the months of February and March, 1929, Fr. Mamilton made further complaints that at times there still was insufficient heat and at other times there was an excessive amount of heat. In the latter part of March he told plaintiff that because of these unsatisf ctory conditions he was going to vucate the offices, but he did not do so and continued to pay rent for four menths thereafter. During the months of april and May the offices were at times excessively hot and he made further complaints. He did not, however, vacate the offices until the end of the month of July when he moved into offices in another building. Apparently there was no trouble from either insufficient or excessive heat during the months of June and July. Dr. Fayne continued to occupy the offices until the latter part of September, 1989, when he moved out. The rent for the month of August had been paid, as had also a part of the rent for the month of September. It further appeared that when in March, 1929, Er. Hamilton told plaintiff that he was going to move, he had aignod a lease for offices in another and new building (which was then not fully completed or ready for occupancy) for a term commencing May le

whereby on some convolute, "to-wit, during all the mention of "unbearable"; and that because of his "constructive wistion" he finally vacated the premises "in July, 1829," and is not indebted.

The state of the second of the same the state of the state of the same of the -jiw radio Lareves believ and has Laird and no bellives notlined To ymamises ed? . orgol . T. jandasich op el. inibalost , sousan these witnesses displayed the following unterial facts in substance: in secosions for hed the sculin of Perceives 1915; and January, 1984, thore was input iteint best in the effices, and, upon complaints wi galifus of land invailible victor of because Tributalo, about south at minusty and livery, if it, benilling with further onegedin in han inod industribunt new files prode quals in twis prainfa he drey recont add at . dead to devens ovicament as and profit again -thmos word letterms spect to expense took blitminic blot of deroil day of the real policy to receive the office, but he did not do not seliges and easy of the carries three-district in the the section of the for the sort one of the series of the series of the series to made lacture completees. We did not, incorre, vanche blue affilies at needlike eint be you as near year to do not be and all fitting another building, there was no trouble from either insufficient or exceeding her touring the months of June and July, Dr. layer continues to occupy the offices until the latter part of To premore land, then he moved out. The rent for the wanth of discent out for ther ods to drag a cale bed as ableg nort bud income. of formered it territors, appeared that once the forcest the statement to Sentition told plaintiff that he were going to move, he had algored dem mode over dolds) galalize con han audicine at applie not same a ally sempleted on ready for escapancy) for a term commencing May la

1929; that the completion of the new building was so delayed that he could not move into the new offices on May lat; that on May lat he know that it sould be several months before the new offices would be ready for him; and he continued to pay rent to plaintiff and to occupy the offices in plaintiff's building until the latter part of July, when he could conveniently move into said new offices. There was no evidence introduced showing that he could not have obtained offices in still another building for temporary occupancy for the intervening period between May lat and August lat.

After considering all of the evidence we are of the opinion that Dr. Hamilton's defense of constructive eviction was not sustained. It is well settled that there can be no constructive eviction without a vacating of the premises (Auto Supply Co. v. Scene-in-Action Corporation, 340 Ill. 196, 201; Kenting v. Springer, 146 Ill. 481, 496); and that such vecating by the tenant must be within a reasonable time after the acts complained of. (Dennick v. Eksahl, 102 Ill. App. 199. 201; Creutt v. Isham, 70 Ill. app. 102, 194.) hat is such reasonable time is usually a question of fact for a jury, though under the circumstances of a particular case it may become a question of low. (Auto Cupply to. v. Scene-in-Action Corporation, 540 Ill. 196, 203; Kinn y. Hlyde, 246 Ill. App. 26, 30.) In the last cited case it is said: "And while it is generally a question of fact whether the tenant vacated the promises within a reasonable time after breach by the landlord, yet such question may be a question of law where all reasonable minds reach the conclusion that the time was unreasonable." In the present case we think that from the evidence all reasonable minds would reach the conclusion that neither Dr. Memilton nor his co-tenant. Dr. Payne, vacated the promises within a reasonable time after the claimed breaches by plaintiff, as landlord, in failing to furnish sufficient

heet or in furnishing an excessive quantity of heat. And, hence, we think the trial court did not err in directing the verdict against defendants or in entering the judgment of May 3, 1930, appealed from coordingly, the judgment is affirmed.

like; the templosium of the no. building use an delayed that he could not may into the met the new of the on key let he knee the new of the world he knee the is a like new of the world be secup, the efficient if building until the inter purb of July, when he could conveniently now into acid new offices. There was no evidence threaded conveniently now into acid new offices. There of fluty and introduced convenient that the deals not have satelined offices in acids and interduced convenient for the

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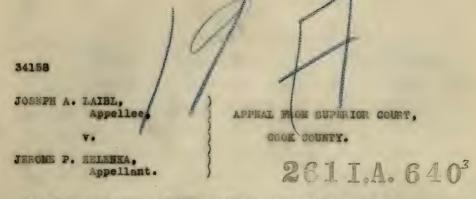
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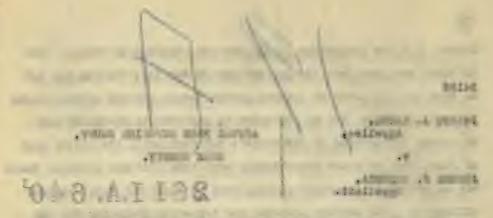
ensines.



MR. JUSTICE KEENER BELIVERED THE SPINIOR OF THE COURT.

A judgment by confession for \$1354.17 was entered on June 13. 1928, in favor of the plaintiff upon defendant's note, and on his petition said judgment was opened and he permitted to plead. On a hearing before the court without a jury May 31, 1929, the issues were found in favor of the plaintiff and it was ordered that the judgment stand in full force and effect. This appeal followed.

when the order of May 31, 1989, was entered defendant moved to vacate it and the motion was entered and continued. On secondar 2, 1929, the motion to vacate the order of May 31, 1928, was overruled and the defendant prayed an appeal, which was allowed on filing a bond in ten days and a bill of exceptions in thirty days. Becomber 12, 1929, the time to file the bill of exceptions was extended to and including January 4, 1934. January 3, 1930, the time to file the bill of exceptions was extended ten days, and on January 12, 1930, the time to file the bill of exceptions was again extended to and including January 20, 1930. Pebruary 1, 1930, it was ordered that the time to file the bill of exceptions be extended to and including Pebruary 20, 1930, numce pro tune as of January 20, 1930. February 5, 1930, a bill of exceptions was signed.



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scaled and filed with the clerk of the Superior court.

The time for presenting and filing a bill of exceptions can be extended only when the order is made before the right to the bill has expired. (Taylorville Sanitary District v. Belson, 384 III. 510, 513.) According to these orders the time for filing a bill of exceptions expired on Sanuary 20, 1930. The bill of exceptions shown in the record was not signed or filed until Sebruary 5, 1930. The plaintiff has moved to strike the bill of exceptions appearing in the record on the ground that it was not signed, approved and filed within the time allowed by order of court for such filing.

In the case of <u>Tierney v. Saumny</u>, 257 Ill. App. 457, the court, quoting from <u>McRay v. People</u>, 145 Ill. App. 277, paid:

"The law does not permit the entering of orders in a cause or the signing of bills of exceptions after jurisdiction has been lost by lapse of time. It is true that after a term at which a cause has been disposed of has expired amendments of the record may be made by nune pro tune orders so as to make the record speak the truth. But in such cases the amendment must be based upon some official or quasi-official note or memorandum or memorial paper remaining in the files of the case or upon the records of the court, the judge's minutes or some entry in some book required to be kept by law. A private memorandum of a witness is not sufficient; nor can the fact proposed to be incorporated into the record be based upon the recollection of the judge or other person, or upon afficavits or testimony taken after the event has transpired. And the basis upon which the amendment was made must be shown and preserved in the order or in the record. Bubbard v. feeple. 197 III. 15; Free v. Lanforth, 126 III. 242. The reason for the requirement that the basis of the amendment be shown and preserved is that the serrent for the exercise of the new jurisdiction may appear. The power of the court to exercise jurisciction over the parties and the subject-matter expires with the termination of the term. Jurisdiction to eart power thereafter depends upon the existence of facts extrinsic to the record. Ithout such facts being shown in the record, upon review the record will show no jurisciction." See also Mabbard v. Jeople, 197 ill. 15; People v. Tosenwald, 866 Ill. 546; People v. Leinecke, 290 Ill. 860; People v. C. S. & C. R. R. Co., 316 Ill. 482.

The so-called nume are tune order of February 1, 1950, failed to meet any of the requirements prescribed by the above referred to authorities. The purported bill of exceptions in this record cannot be considered, for it is no part of the record.

s are not saked to reverse because of any error apparent in

social and filed with the clerk of the Augerian court.

ces to the continue of the record on Jenuary 10, 1820. The bill of exceptions expired on Jenuary 10, 1820. The bill of exceptions shown in the record one signed or filed until Tebruary 3, 1980. The plaintiff has moved to atribe the will or exceptions approved and filed within the time ground that it was not aigned.

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failed to sees any of the requirements prescribed by the whore referred to submittee. The purported bill of exceptions to this record cannot be considered, for it is no part of the record.

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the common law record. There is, consequently, nothing before the court for consideration. The judgment of the Superior court is affirmed.

APPRINKED.

Scanlan, P. J., and Gridley, J., concur.

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PETER J. MANUSOS

Defendant in Error,

V.

MARTIN GROSBY,

Plaintiff in Stror.

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COURT OF CHICAGO.

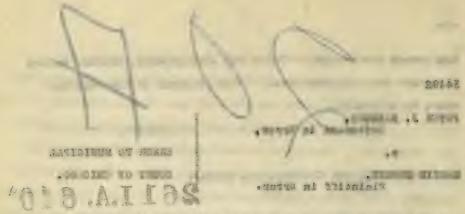
MR. JUSTICE KERNER BULIVERSD THE OPINION OF THE COURT.

estate commission. There was a jury trial. After denial of defendant's motion for an instructed verdict in his behalf made at the close of plaintiff's evidence and again at the close of all the evidence, and denial of the usual motions for a new trial and in arrest of judgment, judgment was entered on a verdict in plaintiff's favor of \$4,125.

Several errors are assigned. Se shall consider only that of the devial of the motion for an instructed verdict.

The question presented for decision is whether or not the plaintiff was the efficient and procuring cause of the sale in question.

The real cetate was owned by defendant on which a large garage was in process of construction. He sold and conveyed the same October 12, 1925, to one Fred Lewis, for the price of \$137,500. The property had been placed by defendant in the hands of his brokers Flotke & Grosby, composed of Milton S. Plotke and Jacob Grosby. The defendant was not a member of the firm. Lewis had been intending to lease a garage but not to buy one, and while looking for one to lease he came in contact with one Prohev, who was promised a commission by Flotke if he procured a purchaser for



THUCO DUT TO HOTHED HAN GREATLY COURSE ADDITION . THE COURSE.

This swit is based upon a claim for a broker's real estate ormaission. There was a jury trial. Item denied of content or the behalf made defendant's motion for an instructed verdict in his behalf made at the close of plaintiff's eridence and egain at the close of all the critenes, and benied af the usual motions for a new trial and in arrest of judgment, judgment was entered on a verdict in

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the property and afterwards took defendant to the office of Plotke & Grosby where he entered into a contract for the purchase of the come, which was afterwards consummated by a deed to him from the owner, who paid a commission of \$2,500 to Prohov for his services as such broker. Weither Levis nor Prohov had eyer dealt with plaintiff or authorized any dealings with him. Defendant had authorized his brokers to offer a commission to any broker who would be the procuring cause of making a sale of the property upon terms satisfactory to him, but not specifically to plaintiff whom he did not know and with whom he had had no dealings. Nor were any negotiations had with plaintiff by defendent's brokers for the sale of the property to Lewis. They had given him the property to list, but they testified that he had never brought to them any knowledge of Lewis. His stenographer, however, testified that she sailed to them a letter dated September 22, 1925, at ting Manusos had shown the garage to Mr. M. T. Butishauser and Mr. Fred "Louis".

he advertised that he had a garage of 40 to 300 car capacity for sale, not specifying any particular property. In response thereto one Moward H. Mutishauser, Jr., called on him and said his father and Er. Fred Lewis sent him, and he manted to take them to see the garage. Thereupon, after some conversation, plaintiff's stenographer filled out one of his printed cards, giving the location of the garage and stating it was offered for sale by plaintiff, and that "this will introduce Er. H. I. Butishauser and Er. Fred Louis to Er. Grosby, Address Esvenswood and Lawrence venue." Underneath was a printed form reading: "I agree if the above place is purchased by me the deal will be closed by the office of P. J. Manusos. If not, we will be liable for the commission." Signature of prospect. This was signed by young Eutishauser and handed to him,

added to such the such as the colored took after as the origina as eds to esaderup wit to't toarteen a collect bereite ed oredr yearth & come, wiled was afterwards companied by a dood to him from the section aid sof valors of 600.25 to notations a blag and articles as such broken. Reitingr Lewis now Freher had ever deals wish plainted of sucheriand any dealings with him. Defendant had of research the brokers to offer a commission to any broker who more wiregons and to alon a paidom to cause and upong and as bluow terms eatinfactory to him, but not epecifically to plaintiff whom at a not know and with whom he had no dealings. Nor were any all with plaintiff by defendant's brokers for the sale of the property to Lewis . They had given him the property to list. on being the thirt has be been sever branch to then our being on His stangesquer, history, testified this she nelled maximum. Xa to blow a little start topication Ht. 1818, at title Homeson had shown the garage to bas H. T. Nutlahaner and has enough . Toular

If we shall of your paralesion to list the property for and, we specify for and, we specifying any particular property. In response thereto one Herend I. Antichewer, Jr., called on him and eald his father and he. Free Level to seld his father and he. Free Level to see the sand he. Free Level to see the filled out one the father than to see the state of the see the see the see the see of his printed cards, giving the location of the state of the see the see the see the see the see the see that the see of the see that the see the see the see the see that the see the see the see the see the see that see the see the see that the see the see the see the see that the see the see the see that the see the see the see that the see the see that the

plaintiff receiving a cerbon copy thereof which was received in evidence.

It does not appear that Putishauser ever used the oard of introduction. It appears that Putishauser and Lowis had been acquainted for some fifteen years and that Butishauser was interested only, as testified to by Lovis, in getting a job in case Lowis leased the garage.

The document in question had no tendency to establish a contractual relation with defendant nor to show that plaintiff was the procuring cause of the sale. At most, it could only show that plaintiff brought the attention of young Butlahauser, and through him that of the purchaser to the property. But there his connection with the sale ended. Upon that evidence and the further evidence that young Butlahauser accompanied Lewis when he was shown the property by one Prohov, another broker, restablishing the procuring cause of the sale.

The only interest young 'utishauser had was to procure a job in case his friend Lewis leased the garage. It was this that prompted him to get a list of places where a garage might be obtained. It was entirely voluntary on his part and not authorized by Lewis. The latter did not know and never had any dealings with plaintiff. Thile Lewis was looking for a place he came in contact with Prohov who also had the property for sale. It was he who specifically brought Lewis' attention to the property and interested him in the purchase. He took him to examine the same and afterwards to defendent's brokers to close the deal therefor.

the procuring cause of the sale rests upon his interview, as aforesaid, with young Autishauser who represented no one but himself and who manifestly had nothing to do with bringing about negotiations for the sale. It was not until Lewis met Prohov that his attention NAME OF TAXABLE PARTY OF TAXABLE PARTY OF TAXABLE PARTY OF TAXABLE PARTY.

of introduction. Is appears this Parinhouser and Lewis had been acquainteed for some fifteen years and that Rutishauser and only, as to tilied to by Levis, in gotting a fob in case levis loaned the garage.

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The enly incorest young satishauser had mad to procure a job in onse his friend Lewie longed the garage. It was this this satishause his control of the cont

Is thus appears that plaintiff's sole claim for being the procuring course of the cale rocks upon his invertice, as eforestic, which young futichedner who represented no one but himself and who manifertly had nothing to do with bringing about negotiations for the male. It was not until levie met Proper that his attention

was directly called to the property or that any attempt was made to negotiate the sale through him. Flaintiff was still ceeking a purchaser after the sale had been negotiated eithout any effort on his part to reach Eutishauser or any one with whom he was connected excepting that plaintiff testified that "I called butishauser a couple of times and accord answered the phone and I tried to truce him back." In order to sustain a recovery by a broker of real estate commissions it must appear that such broker was the procuring cause of the sale effected. (Bovers v. Timpeon, 160 ill. App. 48.) It is well settled law that the broker who has been the efficient cause of the sale in the one entitled to commissions and that this right is not affected by the fact that he sells to one whose attention to the property had before been called by another broker. As said in McGuire y. Carlson, 61 Ill. App. 295, 306, and often repeated in other decisions: "It is not the broker who first speaks of the property, but he who is the procuring cause of the sale, be he the first or second who engaged the attention of the purchaser." It was also said in that case: "The defendent appears to have ected in good faith, and there is no reseen why he should be subject to the payment of double commissions." The law on the subject has also been stated in Baldino v. Henneberry, 191 Ill. App. 368;

"There several brokers are employed to procure a purchaser for real estate and one of them brings an action for commissions, he not only must prove that he commenced negotiations with a party who subsequently purchased the property, but, in order to recover, must also show by a preponderance of the evidence that he actually brought about the consummation of the sale, or was prevented from so doing by the fraud, procurement or miscanduct or fault of the camer. * * * Where an owner of real estate employs several real estate brokers to effect a sale of his property, the broker whose efforts actually bring about the sale is the one who is entitled to the commissions for a sale, provided, the owner acts in good faith."

The broker aust find and produce to the vendor a purchaser who is ready, willing and able to complete the purchase proposed before he is entitled to a commission. (Tilson v. Esson, 155 Ill. 304, 309.)

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to proper to proceed to proceed to the second to the secon

The broker and find and produce to the vender a purchases who is ready, william and able to complete the purchase proposed before

It cannot be said on this state of facts that the evidence presented had any legitimate tendency to show that plaintiff was the efficient procuring cause of the sale. Even if Lewis' attention had been brought to the property by looking at a list of available properties furnished by Sutishauser on which was the property in question, yet as the evidence discloses that Lewis gave the matter no special attention until insuced to visit the property by Prohov, such fact had no tendency to establish plaintiff's right to a commission.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Gridley, J., concur.

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JOHN R. GHARY, Appellant,

V.

H. L. MORKIG and N. W. MORKIG, Appellees. OF CHICAGO.

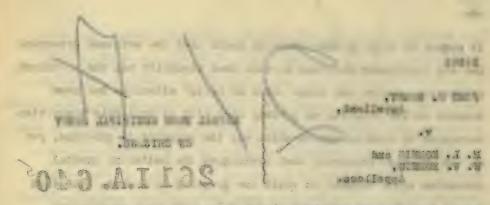
261 I.A. 6405

MR. JUSTICE RELEASE DELIVERED THE OPINION OF THE COURT.

A judgment by confession for \$275 due for rent and \$20 attorneys' fees authorized in the lease of certain premises from plaintiff to defendants was entered and on defendants' petition vacated and set aside. On a hearing before the court plaintiff's damages were assessed at \$183.60, to which was adved as part of the costs \$25 for attorneys' fees. This appeal followed.

At the hearing defendants claimed three grounds of defense; (1) lack of supply of water for maintenance and continuation of defendants' business due to frozen pipes; (2) lack of adequate radiators to enable defendants to supply sufficient hot water to keep the water in flowing condition, and (3) that the windows and doors permitted the air to come in.

It appears from the lease in question that at the time of its execution the leasees examined and knew the condition of the premises and received them in good order are repair, that no representations not therein expressed or indersed thereon - and there was none - had been made by the lessor as to the condition or repair of the premises, and that the lessees would keep the same in good repair at their own expense. There was no provision in the lease for repairs by the lessor unless the premises were rendered untenantable by fire, and then repair by the lessor was merely optional.



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A judgment by conforming for \$875 due for rent and \$20 attorneys' form authorized in the lease of certain premises from the interest and on defendants' petition on the court plaintiff's designed were escessed at 1888.50, to which was adopt on part of the costs for attorneys' fore. This appeal followed.

of the hearing defendants elaised three grounds of defenses; (1) hack of supply of valor for maintenance and eastinuation of defendants business due to fruson piper; (2) had as a second to the second tion, and (3) that the sinders and draws permitted the air to come in.

It expends from the leaves in quention that at the time of its execution the leaves sneadined and knew the condition of the premises and recrived them in good order and regain, that no representations not therein expressed or indexest thereon and there was more - had been made by the leaves as to the condition or regain of the premises, and that the leaves would need the mean in good repair at their own expense. There was no province in the leave for repairs by the leaver unless the fire leaves for repairs by the leaver unless the fire leaves optional.

The lease was under seal and never medified. It was dated April 17, 1928. Defendants took possession under it and operated their business of repairing automobile brakes for over twenty months. January 21. 1930, without giving plaintiff any notice and without paying the rent of \$275 that was payable on the first of the month, defendants vacated the premises. Notwithstanding the plain provisions of the lease, the court, contrary to familiar law, heard testimony of preliminary verbal promises which, if made, unquestionably merged into the lease, and also of subsequent promises to fix the windows and to put in an additional radiator which, if made, were a nudum pastum. The sourt ruled that, "there is an implied duty on the part of the landlord to furnish apparatus sufficient to heat the premises in that line of business to a certain degree of temperature." The law on the subject is so well settled that it is supererogatory for an appellate court to have to refer to it. It seems, therefore, unnecessary to repeat that where the parties have made an express agreement the law does not enlarge or unlify it by implication; (ubens v. Hill, 213 Ill. 523; Taylor on Landlord and Tenant, 8th Ed. Sec. 253); that there is no implied covenant on the part of the landlord that leased premises are fit for the purposes for which they may be rented or that they are in any particular condition; (Sunasack v. Morey, 196 111. 569, 571; Gromwell v. Allen, 161 111. App. 404, 406; Fatson v. Moulton, 100 id. 560); or tenentable or will continue so during the term, and that a landlord is not bound to repair unless he has expressly agreed to do so, and that a promise to repair after the leace is entered into is a more nudum pactum. (Woods on Landlord and Tenant, sec. 382; Humiston, Keeling & Co. v. wheeler, 175 Ill. 514. 519.)

The written lease being before the court in the statement of claim showing express covenants that exclude any duty on the

and \$7 also \$75,000 beyon loss \$3000 needs and \$4000, one dated typil 17, 1020. Defendants took posmonsism under it and eperated that business of repairing automobile brakes for ever breatly market Juneary 31, 1330, without sixting planets no elderne new dust 300 % to due only maken dundthe bee collen the first of the month, defendants vacated the premises. Notgranted alone of an abla to encisive a minig all publications in be leading her, heard brothesp of graticisary verbal presings to only has a seed out and heprom themselves one to an it dolder legoidines as at sug of bas swelmin sat rit of weathern theresease before room only among mount a over action to enterior estudior that, "there is an implied duty on the part of the lindlard to to mail take at more or the to heet to be and at a the company of secides and no mel off ".erusarogmos to serge distant a of acontact true station an ret tradescenter to the being being a al inoger of winnecommunication and and all of refer of man of good wal odd inseperna aresque an obem evan neliga out evalv inii net entropy on particy is implications (February v. Till, Till III. and land to Land and James of Persons of the loss Land 1 that there have been becast testinal and to same one to sent out the best on all and the same of th provident of fit for the purposes for vision they may be rested or and there are in any participales conditions (leaves of we have Ill. but, but, but a silone let Ill. age. des, they belone v. boulson, it id. 560); or toungable or will consinue so during the torm, and that a landlerd is not bound to repair unless he bas said noths ringer of salmong a fall has to be beenga glassugas love to entered into is a more madem packing. (. code on Laudier d end Menant, sec. 182; Numberon, Reeling & Co. v. Wheeler, 175 711. 814, 813.)

Who relited leave being before the court in the charements of clark charter on the

part of the landlord to make repairs and negativing the right to any such grounds of defence as are here made, there was no justification in law for opening up or setting acids the criginal judgment or in entering the judgment appealed from.

As the only disputed facts are thus presented by evidence which, under the principles stated, were inadmissible and should have been disregarded, we sust, in the face of this record, reverse the judgment appealed from and enter a judgment in this court for \$295 in favor of the plaintiff and against the defendants.

JUDGMENT REVERSED WITH FINDING OF PACT

Mcanlan, P. J., and Gridley, J., concur.

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FINDING OF FACT.

We find an a fact in this case that defendants

M. L. Kouniz and M. W. Kounig were indebted to the plaintiff,

John R. Seary, on January 24, 1930, in the sum of \$275 for rent

of the premises known as 7430-32 Stony Island avenue, Chicago,

Illinois, for the month of January, 1930; also for the sum of

\$20 for attorneys' fees in entering up judgment.

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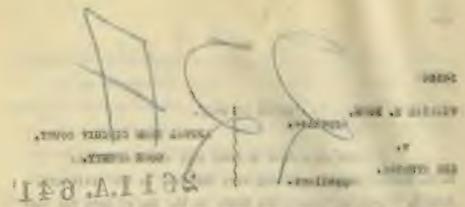


MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit to recover money claimed to be due plaintiff, William H. Burn, from defendant. Lee Sturges, for services in bringing about the consolidation of Sturges & Burn Mfg. Co., a corporation, with the Solar Metal Products Co. The declaration contained only the common counts. The plea was non assumpsit. The cause was tried before the court and jury and resulted in a verdict and judgment against the defendant for \$62,500. Lefendant appealed.

There was no express agreement as to the amount of compensation to be paid plaintiff. The agreement upon which the plaintiff relied to establish his claim against the defendant was in the form of a conversation which the plaintiff claims he had with defendant, in which defendant agreed that if the consolidation went through he would pay the plaintiff an amount, the interest of which would be sufficient to take care of his femily in the event of anything happening. The defendant denied that he ever had any such conversation.

The defendant contends that the plaintiff failed to prove the reasonable worth of his services or to catablish his damages by any proper evidence; that the verdict is against the manifest weight of the evidence and that there was no undertaking by the defendant



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This weeks we derion is communit to recover numby chaimed to be the second of the second of the second of the second counts. The plea was non accumpate. The course was tried before the court and jury and re-

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The defendent contends that the plaintiff failed to prove the research of his services or to entablish his demogra by any proper cvisions the tells vertich in equipment the mailtant the madentaling by the defendant

individually to pay plaintiff and that none will be implied. The entire and only evidence of plaintiff's demages is the testimony of Joseph Wingfield, Owen Moore and Edward C. meeth. Joseph wingfield testified that he had something to do with the sale or consolidation of corporations in the past ten years such as bank corporations and various industrials; that he appearence where no price was fixed for the consolidation or sale of a business as to the usual charge for such services. He was asked the question, "what was the reasonable, usual and customery charge where an individual, at the request of an officer who was president of a corporation of \$1,500,000 estimated value, starts negotiations to have that corporation consolidated with a corporation with a value of \$800,000, and that such consolidation takes place and no price is fixed for the services of the incividual who brings the parties together for the purpose of consolidation?" He replied, that if paid in each it would be ten to fifteen per cent; that if not paid in cash the conditions would change the situation some; that it would be more if deferred payments were to be considered.

even Moore testified that he was a certified public accountant and had occasion to examine into conditions of consolidated corporations; that as such he had been brought in touch with amounts charged as "commissions" for the consolidation of corporations; that he had examined several every year; that he knew the reasonable, usual and customary charge for bringing about the consolidation of corporations, and in response to the question, "what is the usual, customary and reasonable charge where a man is employed to bring about the meeting between two parties which results in the consolidation of two corporations in which the amount of \$1,500,000 is the amount at which the person who employs him valued his corporation," replied: Ten per cent payable in cash is a fair fee. The witness between C. Imeeth testified that he was president of an investment securities company and

vnomines one al someone a This mining to somethre wine but out to of Prooply Lieffield, Drug Brown and Diverse Co. monthly Joseph to ofne one date of or printenen bad of both boiliber bisilen: consolidation of corporations in the past ten years such as bank aredy penalterns and od sadd taletrates another has asold regree no price was fixed for the connelidation or nale of a business as to the wound charge for such services. He am acked the queetion, "what wer the researchle, would and customery charge where an inetvicust, at the request of an offler who was president of a coraved of profitationen witair, select belieful of the in also you to suley a milw melleroures a driv bedebiloanen mellerogree tand el polte en has conte cones anichilectos hous and had ,007,008; -of services of the individual was the parties of He replied, that if gother for the purpose of consolidation?" bing som li same tempe meestlik as must ed biswow si dann at bing biver il tadi temes melicuite sai epasio biver sacitibaci sal dese al .berebianco ed et erem aimente boureles li ovem ed

(wen Loure tentified that he was a certified public accountant and had overwion to examine into conditions of consolidated core than a second that the control of the tenth of the control of the tenth of the tenth of the tenth of the control of th

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as such had something to do with getting parties together to consolidate businesses or corporations during the past ten yearst that he was familiar with the usual, resconable and customary charge for bringing parties together who consolidated organizations; that the maximum was a prescribed, usual or professional fee, and in response to the question, "what was the reasonable and sustomary charge where a person bringe parties together and continues for a time to examine the plant and then the deal to consummated later between the principals and the lawyers, based upon the valuation of the person who employs him," replied: The minimum would be ten per cent, from that up. Objections were made to each of the questions on the ground that the question did not contain sufficient facts; that the question was not in proper form, and that the witness was not properly qualified, and that the question, being a hypothetical question, did not contain facts, and that it did not appear that the witnesses had heurs the testimony. The objections were overruled.

Way engaged in the business of consolidating corporations. There was no evidence of a general usage or custom. In the hypothetical questions the facts, as shown by the testimony in the case, were not stated, neither was the relation of the parties, the time or efforts spent by the plaintiff, the manner or means by which the consolidation was effected. Nor did it appear that the situesses knew the circumstances under which the services were rendered, that they were, where and when performed; nor did they have personal knowledge of all the services rendered; nor were they saked what was the customary charge for particular services rendered, detailed and specifies in their hearing in the evidence or in the hypothetical questions put to them. They were asked only to state the usual, remember and customary charge for bringing about the consolidation of corporations. They testified to the usual and customary commissions paid for introducing pasties in a consolidation

ence of resident selfing paiding dile of or enthance but some en and thrown not being out autant anothe region to encuestione all alles and the cart is and, senseble and the course for mis fails quickenthing to be no little to belonest at her the lessing to their best her and he respected to the contine, what was the streetedy and testing there share salmans of salf a tol samifaco bue resident asist. aferically, and now-less total departments of Long and such has family and and the lacyors, based agon the valuation of the person the exploye him," populate the minimum could be ten get cont. True that up. and and homes, and no encionese out to do so to the even week and au son and mot seent and there there that the agention was not in ing the thirty quest you are made in the completion, and I make in San anious minimas son his ancisamp fraistedinged a paint a little if . vecalized and breat back sacrangiar aid that the best to be to be to be .beletaeve etta ameldestes

Solution of the hundred of the partion of the hypothetics of the out to out the hypothetics of the hundred on the hypothetical questions the fine hypothetical questions of the feathetics of the partion of the consolidation of the partion the the checken of the partice of the checken and the fine high the time allowed the checken and the

in the nature of a broker's fee. The objection here to to the insufficiency of the evidence to sustain the vertice.

The only question necessary to be considered, presented by this record is - has the plaintiff proved the reasonable value of his services and established his damages by any proper evidence? The re-sonable value of services can only be established by showing the usual, customery and reasonable value of the particular pervices rendered. It is the proof of a fact, like any other fact in the case, and unless particular services are described there is no evidence of reasonable value. From this record, it was the theory of the plaintiff, that he was entitled to a cammission established by a customery charge, regardless of the actual services rendered and that it was unnecess ry for him to particularise the services rendered. No incurry was made of the witnesses - what wee the customary charge for particular services rendered, detailed and specified in their hearing in the evidence or in the hypothetical queetion. The defendant was not bound by say custom of the brokerage business, nor could be be presumed to have contracted with reference to any customary charge of commissions paid in that line of business. Fersons not engaged in a business are not bound by customs or usages of the business. ... usage or practice, to have the standing in law as a custom, must be uniform within some sphere: it must be long established and generally acquiesced in: to bind the defendant it must be shown that he had actual knowledge of the custom, or such facts must be shown from which he could be fairly chargeable with having knowledge, so that it entered into and became a part of plaintiff's contract. (yer v. utherland, 75 Ill. 583; Overn v. Churchill, 185 Ill. pp. 505; Kelly v. Carrolle 223 111. 309.)

A question propounded to an expert witness must recite in substance all the services testified to or he must have heard the testimony or have personal knowledge of all the services rendered.

in the nature of a broker's fee. The objection here is to the

The sally question menesicity to be considered, presented by this record to - has the plaintif prove the record of Yearshire require you on avguest she assablishes bee problem all he and you to be be desired as you are not provided to solve account of the women, restaurancy and recommends welcome of the perhicular activates is in it in the proof of a fact, like any center fact in the ours, and unless particular structure are described there is no ovito queeks and car st breast alif more . while aldemouser to sent a ad begulidates motogiames a at beittion ass an days . Trickledg mad was Kurnhaur postures Innies and to assistance convers quantities aboration received and entralicities of all rely appearance are it had agando yramadame shi wew defin - massentiv and he stan ees yringat em or and pluster accordance reactions, desirable and appointed in the bases have ing in the evicence or in the hypothetical question. The defendant was ed out bluce ton terestant obstanted and to metant and punch ton Ye appeals the manufacture that he removed has did to be broaden avoid all becomes commissions raid in that lime of business. Persons not engaged in a agon a. . anemiaso oil to asympt to employ to be book for and accorded or precise, to have the standing in let ou a custom, much be united within once sphere; it must be long established and generally bad ad indi awada ad taum it inchesta adr bate of int basealuses dolaw more swede of Jesus eton't home to amount and to aghelyoud landto be total of find on , white the hard all policy of the first at time ad should be seen a state of Thisties to Jeep a same for the The little war was an all the bear and a contract of mes mil. des.)

at climan the services testified to or be much laws house the services and the services the constituent services and the services resident.

(Yolters v. Enson. 189 Ill. App. 560; Pyle v. Pyle, 158 Ill. 289.)
A hypothetical question is only proper to be put to expert witnesses when the facts therein stated are fairly within the range of the testimeny. (Fuchs v. Tone, 218 Ill. 445, 448), and such testimony is of no value when the hypothetical question does not cover the material facts in the case, such as the relations of the defendant. the circumstances under which the services were rendered, the time employed, the nature and extent of the consultations and all the circumstances surrounding the services. (FeEsmers v. McFamars, 84 F. T. 901; Brady v. Richey & Casey, 187 T. T. 508.) The objections made to the questions propounded to these witnesses should have been sustained. Times we have arrived at the conclusion that there must be a new trial, so refrain from passing upon the weight of the evidence. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Gridley, J., concur.

A hypothetical question is only graper to so put to expert witnesses a hypothetical question is only respect to so put to expert within the range of the when the fact make their fact and the tips the first one, such as the relations of the defendant, the circumstances when the services were rendered, the time the circumstances with the services were rendered, the time the time to circumstances witnesses witnesses, and the time the time to the curtisms propounded to these witnesses should have been much as the curtisms propounded to these witnesses should have been much as well as the cridence.

ACCURANCE CEL CECHONE

Teanlang, P. J., and Gridley, J., compun.

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HARRY J. FIRSKAN, Appellee,

V.

OLIVER F. SMITH et al., Defendants. APPEAL BROM

EUPSWICE COUNTY.

GOOK COUNTY.

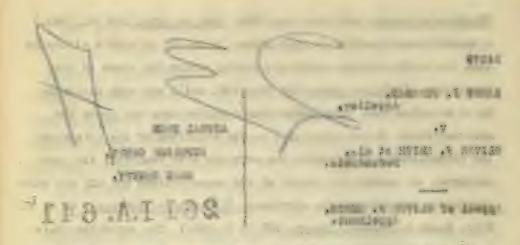
Appeal of GLIVER F. SEITH, Appellant.

261 I.A. 641

MR. JUNION KRAMES DILIVING THE OPINION OF THE CHERT.

Harry J. Firemen, complainant, filed a creditor's bill on a judgment of the Municipal Court of Chicago against the defendant. Oliver F. Smith; the judgment was obtained by William Mughes February 27, 1925, for \$32,403.60, upon a judgment note dated Movember 28, 1921, which judgment had been assigned by Hughes to the complainant June 2, 1927. Cliver F. Cmith filed his cross bill to have said judgment set aside and to have it and the indebtedness declared paid, and to have the bailiff's deed issued upon soid judgment surrendered and concelled. The chancellor entered a decree as prayed for in the amended bill of complaint, finding that the Municipal Court judgment is in full force and effect and unsatisfied as to \$19,008.57, plus interest and costs, and appointed a receiver of all the assets of Cliver F. mith, and dismissed the cross bill of Cliver F. Tmith for mant of equity. To reverse this decree the defendant, Cliver W. mith, appealed. Oliver F. mith will be hereafter designated as the defendant.

The original bill alleged the recovery of the judgment February 27, 1925. Its assignment to complainant June 2, 1927, alloged the issue and return nulla bona of execution, and that



ARE SULTER REMEMBER DESIGNED THE SAME SARE.

tild a reptioner a built administrate annexality to your affinitive tax and deprive specially by French Englishmen and by decoupled a me Clear It letter the judgment was strained by vilities feathers hadah ofte transport a nous closely but not close the groupful complained form a line . Taylo . Taylo ble cross bill to we all lucyment sot sotto and to have it and the indebtedness declared point, and to have the ballist's about bound upon and fudge ment surrendered and equalism. The chamcellar entered a decree sa prayer for in the emended bill of compaint, finding that the befreissens ban deelle ime ease't fini et al Jeragiot frue't faqialmi! co tly, col. 17, plus interest and center, and appointed a reselver of the test of the second of t ed pliver T. Buith for sent of semity. To reverse this decree the Ollym F. mith will be tofraces william of stwift amenated ARCHOTECH OF A STREET, THE STREET

The original bilk alloged the recovery of the judgment February 27, 1985. Its estimate to completent June 1, 1987, alloged the team and return mails bens of execution, and that

defendant had various assets and asked for discovery as to unknown assets. By amendment to the bill it charged that becember 27. 1921, there was delivered to Marry B. Staver, president of Citizens Trust and davings Bank, certificates for 301 shares of capital stock of said bank in the name of defendent and indorsed in blank by him: that said certificates are still in his name and in the possession of the bank and stayer and are still defendent's property, subject to the lien of plaintiff's judgment and prays that the bank and Staver may be ordered to is ue and deliver said stock to the receiver. It also made the bank and staver defendants. Defendant enswered under eath, denying specifically every allegation of the bill except as to the recovery of the judgment, issue and return of the execution and the filing of the seeignment, and elleged that at the time of the entry of the judgment the amount due on the note had been reduced by payments collected by Mughes to less than \$10,000 and denied that anything remained due on said judgment above defendant's claim and set-off; that before the assignment, all money due on the note had been fully paid; that complainant was not the equitable owner of the judgment, that he was a secret agent of Muches, and that complainant knew said facts; that on June 10, 1920. defendant purchased certain real estate referred to as the 91st street property from Marshall Imith, then the owner and in possession thereof, improved with a brick apartment building; that all the conolderation therefor was furnished by defendant but the deed was executed by said Marshall with to said Mushes at defendant's request and said Hughes accepted said conveyance and agreed with defendant to manage said property as defendant's agent and to hold the title thereto subject to his order and upon his request to execute to him at any time a conveyance thereof and during all the time that such title was held by Hughes he would render an accounting and pay to

defendant had vertons and eaked for discovery no to unknown By amendment to the hill it charged that December 27. amontific he invitating present all queue as recognition our error affect foods lesigns to sermin 100 tot rednobilities . Mask spairs bus town? of said bank in the name of defendant and indored in blank by hims that and certificates are still in his name and in the possession of the bank and itewes and are still defendent's property, subject to the lies of plaintiff's judgment and proye that the book and "Bayen may be ordered to lacue and deliver and alog to the recaiver. It also made the bank and server defendance befordent and to maitapalla grevo glissificana antymob addan tobus borowner bill encept as to the recevery of the judgment, in me and return and bogolia has drawngious out to pail!" out the solices out to oden one on and someone and immunity and he water one he emit and the had been reduced by payments solverted by linghes to loss than \$10,000 -bastob avods farming to due se sub bastomer midding fail to be deome's winin and not every took being our succession, all money our and for new smeakeleans ladd thing vilui mase best stor and no he rame frame a new he find stronglet, will be made heldellage Anness and that everialment knew said factor that on June 10, 1920, doll off as all provides usually used alayers annually such allowed strate property from M.rphell Calda, then the event and its passession -mus out the tonis ; multilled immittage folde a dile bavorumi . Lectoris aideration therefor man furnished by defendent but the deed was Spourer of inninetal or reducid bing of dring Clangual bins of bedreens and said Haghes accepted said conveyance and agreed with defendant affit and blod of bue trops administration of grangery bi a spanner of mid of silvest to his arder and upon his request to execute to him Meno tonit ould all the purious one derived and that the these ones title was hald by Marico he would render an accounting and por to

the defendant all money received as rents, processe of sale, mortgage or other transfers, which agreement was verbal, and on the same day Mushes and his wife executed and delivered to defendant a deed conveying this property to defendant which was held by him unrecorded until destroyed: that Muches received and accounted to defendent for the rents from this property up to October 1, 1922, but thereafter ceased and refused to account: that Hushes is indebted to defendent in an unknown amount representing rents, proceeds and income received from said property from and after November 1, 1922, and still continues to collect said income; that defendant has repeatedly applied to Hughes for an accounting and conveyance of said property and has now pending in the Circuit Court of Sock County his bill against Mughes praying for such accounting; that said judgment was entered by confession upon a note signed by defendent for \$30,000; that a pluries writ of execution was issued on said judgment June 26, 1927, and a levy thereof made on defendant's interest in said 91st street property and the same advertised to be sold July 13, 1927; that there are and were at the time of said alleged assignment and builiff's sale due defendant from said Mushes large amounts of money as rents, profits and proceeds derived from said 91st street property and from the collateral security mentioned in defendant's answer to the original bill of complaint in excess of all soney at any time due on said judgment and all money due or owing from defendant to Hughes; that defendant is entitled to said rents and proceeds and anie Mughes had, at the time of said bailiff's sale, and has since, collected sufficient rents and proceeds from said 91st street property and collateral security to entirely pay any indebtedness ever oue to Hughes upon said judgment; that said Bughes is holding the apparent record title to said 91st street property as trustee for cefendant; that complainant has no interest in said judgment or bailiff's certificate of sale and should in equity retain no title or interest

the district of the size of resident to remit, presents of size, watered was need need no hear , Landon and Monterings Dublin any Planton thank to -govern both a smokeriol of terrolity ban be sounce offe ald fan autout Lists bebreen and and bled and delies and bear of timegers all and and year desired the desired and annual and desired the day of the last ogy as al incharetob of oristobal hi godini i ini i and a made mort beginner come and that about the interest and intere of nearly lines filtre most alies a reduced to the one most groups of him solles de beligen glockanger and two so to to do to so the solles athmes were and been grayere this to serve one the middle one and the as the closest funders this this begins to your testers the bar er nucle cartenist held judgment was entered by conferring upon melianous to firm using a sould (COC) Old not small of the land of an Anti- a decemb June 24, 1887, and a levy thereof made an "Toylo ones off has yivegory jeets told blac at forteful n'to be ve To party and an ever how even event sunt truel . Il that bloo of at healt him more swahmers but all a selfilling buy speciment or becall bine Merhow I are committee of boncy as wonter, and proceed dorived -tion wittee a favolation wit must been propose bookle blve mort apress of delagracy to fill function and as seems of an include at bounds police to sub years the bus incomest blue no out soil out to began the to him along him at ballets at broken his property and property of the bartet week has a size of italized him to smit and an about suigal blas ins character forth feld bine much abrevers the eiger incledible bedraffee ansie and property and sollatoral escurity to epitally pay any independence ever due to Sugies agon cold jusquest; that and Sugies is indiding the agreement broaded that is noted \$2.00 atmost property on typoched buy defrence a Thillad to exemple blow at section on and special one of the dertiffeeen of sile and chapted in regity retain no title on interregit

under said sale; that said certificate of sale ought to be surrendered; that said 91st street property has always been worth \$100,000; that said Hughes has also held as collateral security for defendent's notes and inach edness a large amount of bends and shares of stock, which bonds said Mughes has disposed of without accounting to defendant for the proceeds; that Muches obtained said bonds and shares of stock on December 27, 1921, from the State Bank of Chicago; that said collateral security was held by Hughes and certain bonds with interest thereon were paid to and collected by him in full on Way 1, 1927; that at or after the time said Hushes so acquired said notes and collateral accurity from said bank, defendant stated to Hughes that Hughes then held the record title to said 91st street property and to continue to hold it as security for payment of all defendant's indebtedness and that in order to make said Hughes more secure, defendant would tear up said deed of conveyance of said 91st street property so made by Hughes and wife to defendant and thereafter, on January 6, 1923, did so in the presence of Hushes; that said promissory notes, though long since fully paid, have never been surrendered but are still held by Mughes; that said pluries writ of execution, sale, certificate of sale and any bailiff's deed issued thereon are null and void and mere clouds on defendant's title to said real estate; admits said 301 shares of bank stock described in the amendment to the original bill were in defendant's name, indersed in blank by him, appear in his name on the books of said bank and are still in the possession of amid bank and said Staver, and are still defendent's property and were on Jecember 27. 1921, delivered to said Staver as stated in said amendment, except that they were no delivered to said ! taver as agent of William Mughes with his knowledge and consent to be held as collateral security for any indebtedness of defendant to said Mughes.

BUT OF SELECT OFFI WARRANT OF THE PARTY OF T surrements out and along stands property has along been werth girmore investiles as blad out and andput him ands 1000,0012 order to descent a motor of the bound of manne of bonds addit to become and sength hims shoul doing thools to meaning bus bontayes suited but tabeness and not assented as notimeron inc could need and shares of steel on Pecember 27, 1821, from the Canto industry of the complete of the confidential terms of the second of the second sud contain bonds with interest thereon nere paid to and collected by him in full on has I. 1807; their of as after the time side Helbern edned blee mort viruous foresalles has seven blue beriupes on of eith brown and hind much contain dade named as becate tuebus! you gettunes as it him as sunitons at the cleanury feetle fact blos and of all defunding a lacebecouse and that is to a make -men to been time on reed biver implacted acress even assigni block veyance of wid that chart property so made by Hughen and wife to estandant and thereefter, on January 6, 1960, 44d so in the presence as Barrance that said presidency nabes, threat loss shot fully yold, blac July peschall you him hills our see treesments over toyen awar pluries -: it of execution, sale, certificate of usle and any ballexperies on classic cross has high him from our measured burnet hash a 111 ant's tible to suid real outate; admits said 50% chares of bunk stock a smehasteb at over flid Lantgive edd od Jasahasan edd mi hedivood none, inderest in blank by him, appear is his ness on the books of blos bus and are acted to personed and allies ore bus dand blos Observa and evil networking property appropriate the contraction of less, delivered to and others so neared to mend amendment, esset sedguil melili" to inche se revest bles of herrylich on erev well dall yelrupan farefulles on blad of of dament on appeller wit ald 1010 for any indebtedness of defendant to anid Muchess The defendant's cross bill contained the same allegations as his answer and prayed that said bailiff's certificate of sale and any bailiff's deed issued or to be issued thereon may be set uside and declared void as against defendant as a cloud upon his title and that complainant may be required to satisfy said judgment of record in the Municipal Court and have general relief.

October 29, 1928, complainent having moved for the appointment of a receiver, the court ordered that the motion "be held in abeyance pending a hearing on defendant's offer to prove that the judgment had been paid some time between February 27, 1925, and June 2, 1927, and that the cause be referred to a master to hear evidence and report on the sole question 'was said judgment paid by defendant to Hughes seme time between February 27, 1935, and June 5, 1927? ** A hearing was had before the master, at which defendant and Hughes and other witnesses testified and documentary evidence was introduced. The master filed his report in which, after making numerous findings. he concluded that "said judgment has not been paid." On December 11, 1928, the chancellor approved the report of the master and entered an order appointing a receiver for the assets of the defendant. From the entry of this order defendant appealed. This division of the Appellate Court affirmed the order appealed from pril 30, 1929. During the time the appeal from the interlocutory/was pending and on January 9, 1929, the cause was referred to a master to take proofs and report the same with his conclusions of law and fact; a hearing was had before the master at which witnesses for the respective parties testified, and documentary evidence was introduced, and it was stipulated that the evidence that was taken on the former hearings shall be considered the same as if the parties called the witnesses at this hearing. The master filed his report, exceptions filed by the defendant were overruled and the court entered the decree appealed from, in which

The defount's come will contained the passe allogations of the may be prepared that the destructions of college and any besitiff's dead heard or to be leased thereon may be est to be leased thereon may be established that completeent may be required to entiry entity and judgment of record in the Manicipal Court and have gomeral relief.

deleber 22, 1988, complainent having mored for the appelaintof hisd od" motion of the breart ordered the socioors a to see and dued aroun of unite a inabasists up partners a tall targument has plant over the best account of the land, and the damped semplive used of resease a of barreter of same and faid bar . TSSI .28 desherbs at him them but blue new notices a sol to freger bee along the party of the property of the property of the party of sudjull bus suchusted delaw se trebent out are bud and any at and origin witnesses Benjiriy with a second or the barry as training a second or a few and a second or our parter Filed one regest in enion, eiter sexing suscept findings, ". bing snod ios ami duemphul bina" andi bebulomen ani in December ille 2008, when execution encorated the segment of the guarantees and external an order appointing a receiver for the second of the defendant. From This divisies of the . helpegos imahartet vehvo minis te yrima anti . It is a fire afficace the order appealed from pril 20, 1929. has antheny nor granteentavalled the live to the collection of along sales of the and the constant and the sales to a manter to the sales and palues a tion the wat to enclusione and astroom one trager has to had briors the neater at which witnesses for the mapocite parties hedaligits nor il hes .brankerint our symbles grancement has abstitute that the evidence that was taken on the former hearings chall be comsidered the same as if the parties called the witnesses at this hearing, arew inchestob ems ye ball amoltycane, troper ald ball't reteam . . court and the court entered the decree appealed from, in which

the chancellor finds, among other things, that on February 27, 1927, a judgment was entered in the Municipal Court of Chicago in favor of William Mughes and against Cliver F. Math, in the sum of \$32,403.60, which judgment was based on a certain judgment note for \$30,000 executed by said Cliver F. Math. That an execution thereupon issued upon said Judgment Sirected to the bailiff of said Municipal Court of Chicago, which said judgment was returned no part satisfied; that said Judgment was subscausally assigned by the said William Mughes to Marry J. Wiremen, the complement, who is the owner of said Judgment.

That said Oliver P. mith at the time here in question was a banker; he organized the ditizens frust and Cavings Sank in 1905, and became its president. Frior to becember 23. 1921. said mith and said Mughes had various financial dealings with each other: that on December 23, 1921, about one o'clock in the morning, amith came to the home of Mughes, and told him that it was necessary for him to have 180,000 the following day, because he was in some trouble in the bank. Hughes promined to help him raise the money; he told him that he had \$10,000 in cash and Smith suggested that Hughes could procure a loan from the State Benk of Chicago. December 24, 1921, Smith and Hughes by appointment met Maurice Berkson, an attorney, who prior to that time had been attorney for Smith and said Citizens Trust and "avings Bank, but represented Hughes in the transaction in question. mith agreed to turn over to Mushes as security for the loan, a note guaranteed by the directors of his bank for \$30,000; also 301 shares of stock of the Citizens Trust and Tavings Bank, and a second mortgage bond for \$40,500 on the spencer building in Chicago. . with promined to pay all the loan to Hughes within a year. Inith ass Hughes went to the State Bank of Chicago with attorney Barkson, where Smith introduced Hughes to one Cox, vice president of the bank, and told Cox that Sughes desired to make a loan; that he would give as accurity second

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the State of their and beautiful to profit opening of manual and and smalle space with embryings triving a married and desired are place place in a definidilm and becomes the little waves one at almost he les warming, builty ald not greecesses see a see over new three necessary for him al oldusts success to was in some treatle in the many states of the sale of water blues compare over independent office have no occupied and had care a team from the course that of this was secured by little bailty Rains and accounts no amount outside from the parties of reduct her to that time bed acres absumey for built and nid birious Truet and encious at neitenment and an endyth between our sum in questions will appear to the even up before as member for the Louis or note according to the director of his bunk for disipont and the bosses we and the second of the second o proposed them, to the tiperate burnings in Colombia, the contract and the colombia and and loan to limines within a year. 'with and linghes wone so the coate hat all allower with expensely thereto the a mith interthese Maghee to one det, when provident of the hank, and told Con that Ameron Titues or evil blues of tell treel a calm of herical

mortgages on two buildings, one at \$300 Hichigan avenue, the other at 5400 Prairie avenue, also the \$40,500 spencer building bond. A few days thereafter the bank agreed to make the loan and the transaction was finally closed by delivering to said State Bank of Chicago a check of Hughes for \$10,000, a note signed by Hughes for \$70,000, together with the collateral heretofore mentioned. The State Bank of Chicago turned over to Berkson, several notes which anid bank held as security for Smith's loan, one of said loans being for \$30,000, dated November 28, 1921, another for \$20,000, dated June 2, 1921, and another for \$25,000, dated September 6, 1981. The stock of said Citizens Truet and Savings Bank was not turned over to Mughes, the only collateral received by him at the time was \$40,500 Tpencor building bond and said \$50,000 note, on which the judgment hereinbefore mentioned was entered. Between bestaber, 1921, and June, 1921, Smith made two payments on account of asid indebtedness, one for \$3,000, and another for \$1,000, making a total of \$4,000, which was to apply on asid note guaranteed by the directors of the Sitisons Frust and Savinga Bank.

Bank of Chicago when it became due. In June, 1922, Smith told Hughes that he needed \$10,000; that he had \$12,000 worth of Motor building bonds; that he would turn the bonds over to Hughes if he would give him \$10,000 in addition to what he had already advanced to him. Thereupon, Hughes gave Smith his check for \$10,000 and received \$12,000 worth of each Motor building bonds. In order to raise the \$10,000 Mughes made a loan for \$10,000 at the bank and gave his note therefor payable in ninety days. In November, 1922, Smith told Hughes that he could not pay the \$80,000 he oved him as he had promised, and stated that he desired to settle the matter; that he would give him the Spencer building bond for \$40,500 and the equity in the building located at 91st street and Escanson avenue, values at \$25,000 being

todas oil commo organis into to any approximit on the anaughnia when I would be the comment of the contract of and her must be a sing of image time of reflected gast with a To your state him or guirrettely be become threat or mateupoid. - NAT AND AND AND ADDRESS OF A TOMAN OF THE AND ADDRESS OF THE AND ADDRESS OF THE \$70,000; together with the collected impreserors memiloned. The State Anno him delas codos Loroves amedica os vevo haras delas de Anno .000,000 nel make amen't him in was president for the party of the contract of dubed Movember HB, 1821, emerger for \$12,000, dated fone 2, 1821, and named to describe the contract of the contract Citizens True and device Mank age not turned over to Mughes the only amining retroit the contract of the contract of the contract interest in the contract of the c warm sietige or a committee out on the committee of the c the state of the s and the payments on account of each independence, one for \$3,000, and or the state of and make a transfer a transfer to the state of the sta o li. . . - - isoalb sai ya besimarka eda bine avince Bunks.

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subject to a mortgage of \$41,000. On October 14, 1922, Eughes wrote a letter to Smith in which he said: "I am returning herewith note for \$30,000, to be signed by you and indorsed by Messrs. Euber, Cameron, Smyth, Hagaman and Staver. This note is a renewal of note given me by you and indorsed by your directors as collateral for loan necured by me for you from State Bank of Chicago December 24, 1921. Sign this new note and have it indoxsed at once. On receipt of same I will have old note cancelled and returned to you."

In the early part of November, 1922, Hughes and Smith came to Berkson's office with a statement of their various transactions in connection with the loans, and Mughes stated that he had settled his metters with faith as well as he could, under the circumstances, and that he, Hughes, was to have the property at 91st street and Escanaba avenue; that he, Sughes, was to have the Motor building bonds and the Spencer building bond, and that he, Hughes, was allowed a discount of 14,000 on the Opencer bond and a discount of \$2,000 on the Notor building bond, and that he, hughes, was to retain the 350,000 note indersed by the directors of the bank, or which \$4,000 had been paid. Smith and Hughes informed Berkson that they had agreed on all of the items, and that the balance due Hughes after the adjustment of the various debits and credits was 18,008.57, for which a new note was to be signed by 'mith and indersed by the directors of the said Citizens Trust and favings Bank. A note for that amount was drawn by Berkson and given to Smith, who was to procure the necessary signatures thereon; said cirectors were also to guarantee Hughes against loss on notes which he had indorped at the bank. statement showing the various debits and oredits was prepared and submitted by Mughes and Maith, as follows:

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In the terify park at Recommen, 1981, success the leading anolicanusti escluy tient is inequista a dile collis alacented of emoin consection with the large, and the section that is had settled his was a manustry and tobay bloom on an allow and it with attention adinari o fina i fi i i odi avini od ana quenzinë pod fi i and the photo hat her was to be to the ball and the sea the hour ball and the the salding name, and time inc. Whitee, was milowed a disaguate wood and no Cim. \$3 to Improving a hor more women, out no COS, At to building bond, and that no suches, me to sould the cat the cat. inderned by the directors of the same, on which \$4,000 has been paid. will to its no section had gott loud number secretal negling but added thems, and that the believes due Hoghes after the adjustment of the various doubts and erette was 'la, Co. 37, for which a new note was amount to him on: to notoes in reit and househeld him distait we began a de co newiself in much and course soid not odon! I wind agricult has say? and given to intelly were to prount the necessity elements thereon main's mater me and Juniage assigns talmerous at only ever execute bias added and trader and tradering the band added to ture band and and and oredita was presented and submitted by displace and failed, as follows

"State Bank of Chicago - Balance due. Citizens Bank - Mote Citizens Bank - Rete Citizens Bank - Rete Citizens Bank - Hote Citizens Bank - Int. Paid Citizens Bank - Int. Paid Citizens Bank - Int. paid Atty. Fee and Expense - 91st Loan Spencer Bonds - \$40,800 Rquity 91st St. Bldg Int. Spencer Bonds to 10/1/22 Int. Spencer Bonds to 10/1/22 Int. Meter Bonds to 10/1/22	10,000.00 16,000.00 3,567.50 8,311.90 54.83 161.42 119.17	\$36,500.00 10,000.00 25,000.00 708.75 472.50 420.00

At the time of said agreement between Mughes and Smith in Berkson's office in November, 1922, the property at 91st street and Escanaba avenue was discussed, and Berkson inquired whether it was necessary to draw any conveyances or documents in connection therewith. Borkson suggested that if Hughes had title, it might be well to reconvey to Smith and have Smith execute another deed to Hughes, and Berkson prepared the deeds and gave them to Hughes, but after ards imith told him that the deeds were torn up, that Hughes already had title and that it was not necessary to make any further conveyance. The court further found that Mushes did not execute any deed conveying the property to Smith prior to the month of December. 1922, when said deed was prepared by Berkson for the signature of Mughes; that a deed was to be signed by Hughes and wife, reconveying the property to mith, and another deed reconveying the property by mith to Hughes was prepared for the signatures of esith and his wife; that said deeds were then destroyed by inith, who stated that it was not necessary to reconvey the said property, as the title was already vested in Rughes. The court further found that the statements of collections of rents and expenditures made by Hughes were submitted to inith up to and including Revember 30, 1922. On said date the balance due Hughes, amounting to \$2,311.90, appeared on said statement and said

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The court found that by a prior decree entered in said cause. the judgment had not been paid or in any way satisfied at any time between February 27, 1925, and June 2, 1927, and that no part of said judgment has been paid or satisfied since June 2, 1927; that on November 28, 1922, upon a conclusion of the settlement between filliam Mughes and Oliver F. mith at the office of attorney Berkson, there was due and owing from said Cliver F. Smith to said Eughes, \$19,008.75, and the court found that there was that sum due from smith to complainant by virtue of the assignment of the judgment hereinabove named, plus interest at six per cent per annum from November 28, 1927, plus all costs and attorneys' fees incurred by the complainant in procuring judgment upon said note for 130,000. The court also found that Cliver W. Swith claimes to be the owner of 301 shares of the capital stock of the Citizens Trust and Savings Sank of Chicago, Illinois, which he had delivered to Harry B. Staver;also that Cliver F. mith had a suit pending in the Circuit Court of Cook County against villiam Rughes for an accounting and that said suit constitutes a chose in action, and that whatever interest Oliver F. Smith had in said suit is subject to the lien of the judgment of the complainant above mentioned, and by the decree reappointed the Union State Bank of Chicago as receiver of all the assets of every kind, nature and description,

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arutioned, and by the decree recypointed the imigs take Tank of Chiengo as receiver of 11 the assets of every kind, nature and description,

real, personal and mixed, belonging to Cliver F. mith, and directed Cliver F. mith to assign, turn over and delivered to the receiver all of his right, title and interest in and to the 301 shares of the capital stock of the Citizens Trust and Mavings Bank of Chicago, Illinois, and in and to the chose in action pending in the Circuit Court of Cook county entitled Cliver F. Smith v. Filliam Mughes.

Sany points are urged by defendant as grounds for a reversal of the decree. It is claimed the decree should be reversed because the chanceller treated the interlocutory decree as a sincing former adjudication, and that the interlocutory decres should be given no weight on a final hearing. To have examined the cases cited as well as the evidence in the instant case, and are of the spinion they are not applicable for the reason that in the cause cited the court, after the entry of the interlocutory decrees in those cases, refused to permit the parties to offer or consider any evidence in support of their contentions (Price v. Springer, 141 Ill. 230, 235), while in the instant case the court did not reject any testimony offeres on any question passed upon by the interlocutory decree, and the court had before it all of the textimony taken on the first reference as well as on the second reference. It is apparent from this record that the court did not consider it was bound by the interlecutory decree and that the final scores that was entered was based on all of the evidence heard by the master which was before the court at the time of the ontry of the decree appealed from.

Defendant contends that the findings that william Rughes is still the owner of the 91st street property and that defendant has no interest therein, and that no settlement transferring title to this property or the collateral to Hughes was shown, are not justified by the evidence. It is true, the evidence is conflicting, but an examination of the entire record convinces us that the

Iller I. Inite to sout m, such ordered to the receiver all filters I. Indiana. It is the receiver all initial to the receiver all initial interests of the receiver and delivers. In the receiver and the receivers and the receiver

Increver a ret abancus na inchertub ze bezar na ednicz une: nagened Asserted as history obtains the basising at \$4. Approx of 30. the chancellor treated the thir rievarery decree as a chatter former adjudication, and that the interioral or a should be given me weight on a final hearing. To here escated the cases cited as well and that optioned in the transfer, each and all all options of the tarte arrain say leddy comes son let rost severe all not accomplishe year and datay of the interleavely decrees in these cases, refused to grants has parent as action to relate the consist of the purpose in their consensions (Frice v. Carteser, Col Mil. 180, 208), while da bhe implest case the court did not reject may tookingmy of feret on any had from one one one interferences decree and the accession and line as open for farl' all as me month year to ave le lia di ere'sed dead broom alife more the course al il . sommeler baccom and an am seroob groinceliniat mis ye bound as it roblemes ton alb truce out and that the fland search and entered and shad the fland the emis and in irver and arolled new deline reduces and ref broad considera of the entry of the dearer appealed from.

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justified by the cridence. It is true, the cridence is conflicting,
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chancellor was juntified in the findings, it appearing from the evidence that the defendant was a banker and in 1905, organized the Citizens Trust & Wavings Bank and became its president. Smith and Hughes had various financial dealings with each other. I comber 23. 1921, "mith came to Mughes' home and said that it was necessary for him to have \$80,000 because he was in financial trouble. Mushes agreed to assist him, telling him that he (Hughes) had \$10,000 in cash. Smith suggested that Hughes could procure a lean from the State Bank of Chicago. On the following day they met Maurice Barkson, an attorney. At that meeting, whith agreed to turn over to Hughes as security for an \$30,000 lean, his note guaranteed by the directors of said Citizens Bank for \$30,000; also 301 shares of the stock of said bank, and a second mortgage bond of \$40,500 on the Spencer building in Chicago, and further agreed to pay back the loan to Hughes within a year. Thereupon, Imith, Mu has and Barkeon interviewed an official of the State Bank with the result that the bank decides to and did loan [80,000, receiving at the time from hughes his check for \$10,000 and his note for \$70,000, and collateral security as follows: second mortgages on two buildings, and the 40,500 apencer building bond. The bank turned over to Berkson several notes which it held as accurity for Smith's loan - one of them being "a note for \$30,000, dated Movember 28, 1921," another for \$20,000, dated July 2, 1921, and another for \$20,000, dated Ceptember 6. 1981, but the stock of the Citizens Bank was not turned over to Hughes, and the only collateral received by him was said \$40,600 Spencer building bond and said \$30,000 note. Hughee was compelled to pay at its maturity said \$70,000 note. In June, 1922, Smith told Hughes he needed \$19,000, that he had \$12,000 worth of Motor building bonds, and that he would turn over these bonds to Hughes if he (Hushes) would give him \$10,000 "in addition to what he had al-

sale more particular all prominent our an outstand, one californial wall bendinger about his tenders a nor analysis art and benefits her tilled a turblants have notice but which aparts of turblants and the A THE PARTY OF THE PARTY STATE OF THE PARTY this paragraph and it had not been the paragraph and and the said a limit of the him to have this is because he wen in Missnell trouble. Muches I was seen as the second transport I am and the parties and real and because their least of temperature with the party of the party line in the large son, an attorney. It that mostler, faith agreed to tuen over to Hurhes as scenity for an \$20,000 loom, bis more guaranteed by the directors to doors and to occame for male : 300,000 not dead asserted bins to -blied repres ons so 000,040 to beed engagers because a bee than bles ing in Cileage, and farther agreed to sur back that to Miches with-Establish an heavy with may stall be one and and an annual years of the mont him has no believe himse and soil since and site inall edges odd ... and Ott. To the state with contract which was to maisteen the Co. Oc. his nets for this callaceral ascertar as follows: ad' . brood and allud research 100%. Details bur the brook areas areas areas ough burnes ov r to Meruson esveral metes it held as scourtly tor inich of team - care by the and to the for total rol becomber 28, 1901," santher for \$10,000, dated July 8, 1921, and another for \$30,000, dates orplember 6, 1881, but the stock of the Citizens bank was not termed over to Hawhor, and the only collaboral resolved ed all seed of the bar and and include and and the seed all the Maghes was compeller to pay thits makerity said (70, his mote. 1922, faith told reines he more \$10,000, that he had \$13,000 worth asked and to have some and that he said they over the bode to Muchen "Is how on July or noishing of" (tita, if will ovin blue, (sompull) on hi

ready advanced him." Thereupon, Hughes gave to mith his check for \$10,000 and received from Smith \$12,000 worth of said Motor building bonds. It further appears from the evidence that in Nevember, 1922. Smith stated to Hughes that he "could not pay to him the 180,000 that he owed him," and further stated that "he desired to gettle the matter, that he would give to him (Mughes) the Spencer building bond of \$40,500, and also the equity in a building located at 9let street and Ascanaba avenue valued at \$25,000," on which there was a mortgage of \$41,000. Sout this time Smith and Mughes showed Barkson a written statement of their various transactions concerning the .80,000 loan and Hughes stated "that he had settled his matters with which as well as he could under the circumstances: that he (Hughes) was to have the property at 91st street and Ascanaba evenue and the Motor building bonds and the Spencer building bond and he was to retain the \$30,000 nets indersed by the directors and on which 14,000 had been paid." #t this interview both Inith ad Mughes informed Berkson that "they had agreed on all of the items and that the belance due to Mughes, after adjustment of the various debts and credits, was 10,008.87, for which a new note was to be signed by fmith and indersed by the directors of anic Citizens Bank." A note for \$19,008.57 was drafted by Berkson and given to mith, who was to procure the necessary signatures thereon, and there was a digcussion concerning the 91st atreet property. Berkson inquired whether it was necessary to draw any conveyances or documents in connection therewith, and suggested that if Hushes already had title thereto it might be well for him to recenvey to whith and have whith execute another deed to Hughes. Berkson prepared the deeds and gave them to Sughes, but Smith subsequently told him (Berkson) that they "had been torn up." and for the reason that "Mughes already has title and it was unnecessary to make other conveyances."

The defendant's next contention is that a fiduciary relation existed between him and William Hughes. A fiduciary relation exists

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in all cases in which there is confidence reposed on one side and a resulting superiority and incluence on the other. The origin of the relation is impaterial. If the confidence in fact exists and is reposed by the one party and accepted by the other, the relation is fiduciary and equity will regard dealing between the parties according to the rules which apply to such relation. (Peeney v. Munyan, 316 III. 246.) The relation being satablished, the burden rests on the beneficiary of the set to show by clear and convincing proof not only that the transaction we fair but that it did not proceed from a betrayal of confidence (McCord v. Roberts, 334 Ill. 233), and it exists between principal and agent. (Mors v. Peterson, 361 111. 532.) The contention of the defendant is, that from the record it appears that Hughes sustained the relation of agent to defendent, menaging the 91st street property, collecting the rents thereof and accounting for the same as agent, and the actual reposing of trust and confidence in Mughes by defendant in having the property deeded to Hughes to hold for defendant without having anything to show therefor. Notwithstanding the law views with distrust transactions whereby a party having the confidence of the other obtains property, the distrust or suspicion may be shown to be unfounded, and will be removed and the transaction regarded as valid if it be made to appear it was entered into with full knowledge of its nature and effect, and was the result of deliberate, voluntary and intelligent desire of the party acting, and was not secured by the exercise of the influence engendered as an effect of the relation. (Rellogg v. Peddicord, 181 111. 22; Roche v. Roche, 286 1d. 536; Neagle v. McMullen, 334 id. 168, 176.) It appears from this record that defendant was a banker who had helped organize the Citizens Trust & Davings Bank in 1905, and become and was its president until 1921. when it was discovered he had overissued the bank's stock by 283 shares; that he resigned as president but remained a director of

the play and no learning provide that all result stated at your 214 Mills the velocity ta tar . . . If the could beach in feet axists to ans you have ground the and directed pulliate kroper tills utility and opened and definite parties coretary to the . . . the anoly to anoly releasions Title Title Title Title To rejection being ortable tutte has reade ye wade of the out to yrately . යීසී ක්කාල්රි කිකුලේ අතුම්ම ස.හ. සහයිජීවශසනයක් සන්ජී සිස්ස්රි : adrado" a haplatt acception to foreign AT REAL ABOVE OF LOCATION OF STREET, S and eal danhardon of the defendant in the their to noticine all backers contained to and here affects he man the feet that the best before after and at anchorate yet under the Hagden by derivation to thought tended to tell at the deland and delanders without are en the law view of the law is the law view as lo sancillus ed: grived giver a gérrou: enc. os anode os yaa noioigann va sauveitä as bobinger golfrimmert sit hav hav opicional first dain oral breston and il rurges of whose of it is biley of its maker and effect, and car the result of deliberate, voluntary and intelligent some sur ban extrem metter, and was not necessed by the energies of the inthuses engantered as an offert of the relations interpolity pages 11. 11. 16. 1565 the 1565 Newsle v. McMalloo, Wid id. 165, 176.) It appears from this resert fored annually old entauges bagins too pain radiant a -- minterfiels hold . 1201 Illam farbliory att saw har seemed bur . 1301 mi dash americal & when it was discovered be and everimmed the bouk's eleck by 888 To recreate a houleser sud suchinery on surject in their recrease

the bank for several months, when he left the bank and entered the real estate business, and when the facts before stated are considered we are led to the conclusion that the settlement arrived at between defendent and Hughes was the result of deliberate, voluntary and intelligent action on the part of the defendant and was not secured by the exercise of any influence on the part of Hughes.

te have considered the argument of defendant's councel that evidence of fraud is to be found in an alleged discrepancy between the value of the 91st street property and the price at which it was accepted by Hughes in settlement of his accounts with defendant, as well as the claim that Mughes retained the notes and collateral and later sought to enforce the indebtedness for a larger amount, and that the rents and proceeds of the collateral were sufficient to satisfy the indebtedness, and that Bushes received the shares of bank stock as collateral, and find no merit therein. We are of the opinion that the trial court had jurisdiction to make its fineing and decree with reference to the cult for an accounting cending in the Circuit Court between the defendant in the instant case and William Hughes, and we have considered the contention that the procuring of the judgment in the Bunicipal court of Chicago for an excessive amount was a fraud upon the court entering the judgment. and are mineful of the maxim that fraud vitiates every transaction into which it enters and applies to judgments as well an contracts. is before states, the judgment of the Municipal court was for (32,403.60. The Superior court found there was due on this judgment 119,008.57. On the hearing of this cause the complainant claimed that there was due him more than 11,008.57. We cannot hold that solely because the court found that there was but \$19.6.8.57, plus interest, costs no attorneys' fees since February 27, 1985, due the complainant, the complainant should be deprived of the amount that is actually due him.

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Brander of Controller by Disapport to be religious wend of to amove all benefits as at hower od of at heart to complive said an entry only two syracors despite doubt out to notice and recommend gily acqueso a ski to insustition at someth of buttoon and it is a but atder our restores corner state alone our as files no grackerbes teptal a til seega-itetal my certifes an officer rader due ferminises amount, and thut the rents and proceeds of the calistonal ware and the and the starty time independence and the include the add and all the elites of bank stock as callalaral, and find as ment therein. We ast page of potationizal, ban squee Lairs and said neinige out to one -bree agreement of the color of the color of the appeal been agreed and the direct Court browns law and the court in the first and the and William Markes, and be bere considered the control mailing bas producting of the independ in the Sunicial state of the control snowhal and makes are on the end age hader as and sudane belosees and are windful of the auxim that fraud williaben every transaction assortines as Alex es sinusphol at adding the erates il deliv oini to be desired the interest of the interest and the interest and the interest and in dramphul, also one over sense terms relegate on the day of the and blod terms of . Ta. F.C. . To mand aron will nob are anoth and awig . 78.8 10.811 but as areas four bases rise success rising between and otherwise for almost binder of the least the contract of

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admissibility of evidence, primarily in sustaining complainant's objection to the question put to defendant as to the value of the 91st street property, defendant offering to prove it was worth \$100,000; and to the question put to Hughes asking what amount of rent Hughes collected between February 27, 1925, and June 1, 1927, and subsequent to the last statement that Hughes rendered to defendant. If we are correct, as se think we are, in holding that a settlement had been made, as before stated, whereby Hughes was to have the 91st street property at a valuation of \$25,000, proof of a greater value and the rents collected after the settlement was made would be immaterial, and no error was committed in sustaining the objections.

after considering the entire record and the remaining arguments of defendant's counsel, we are of the opinion that the decree of the Superior court should be affirmed, and it is so ordered.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

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MICHAEL M. EGAR. Appellee.

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CARLOS AMES, ARCHIEALD J. CARRY and EDWARD J. DENNEARK, as Civil Service Commissioners of the City of Chicago,

Appellants.

SOOK COURTS

261 I.A. 6413

AR. JUSTICE ERRNER DELIVERED THE OPISION OF THE COURT.

Respondents appealed from a judgment for petitioner. Michael M. Mgan, in a proceeding wherein by writ of certiorari the latter sought to have his discharge from the Police Department of the City of Chicago declared null and void. After the writ of certiorari had issued the respondents made return by filing their record, and moved the court to quash the writ of certicrari and to dismiss the petition on the grounds inter alia that the return of the respondents shows on its face that respondents in the matter complained of had jurisdiction of the person of the petitioner; that the return shows on its face that the finding made by the respondents was a finding in all respects legal and valid, based upon written charges, a hearing had thereon and participated in by petitioner and his counsel, and a finding of fact made from the evidence and that said return shows on its face such laches that said petitioner by his lackes of more than six months in filing his petition, is estopped to question the legality of the proceedings of the respondents as set forth in said return. The court overruled the motion and sustained the motion of the petitioner to quash the record and found that the Civil Service Commission of the City of Chicago was without jurisdiction to order the discharge of the petitioner from his office as patrolman. By this appeal the respondents seek the reversal of this order.



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The petitioner has not appeared or filed a brief in this court.

Petitioner was a patrolman in the Police Department of the City of Chicago. On September 17, 1924, he was notified that on September 15, 1924, charges had been made against him of violating paragraphs 1, 4 and 18 of Section 1, Rule 30, Rules and Regulations of the Department of Police, prescribed and in force Hovember 1, 1910. (1) Intoxication. (2) Conduct unbecoming a police officer. (3) Insubordination or disrespect toward a superior officer. The charges specified that at about 11:10 P. E. on September 7, 1924, petitioner was found at the Checker Cab Garage, 5862 Broadway, in an intoxicated condition by Sergeant Charles M, Mueller of headquarters, and that petitioner pulled his revolver and fired one shot at the abdomen of Sergeant Mueller, which went wild, and he was then disarmed. From the record it appears that upon the hearing of these charges the petitioner was present and represented by counsel throughout the proceedings and participated in the examination of witnesses; that all the witnesses were sworn and testified and upon such evidence the Civil Service Commission found the petitioner guilty of violating paragraphs 1, 4 and 18 of Section 1. Rule 30, Rules and Regulations of the Department of Police, prescribed and in force November 1, 1910. (1) Intexication. (2) Conduct unbecoming a police officer. (3) Insubordination or disrespect toward a superior officer, and specifically set forth that said petitioner, a patrolmen in the Bolice Department of Chicago, Illinois, assigned to the 33rd District Police Station. on the night of September 7, 1924, was assigned from 4 p. m., until 12 o'clock, midnight, to guard duty at the Checker Cab Garage, located at 5862 Broadway, Chicago: that about 11 o'clock F. E., on September 7, 1924, Charles Mueller, Sergeant of Police of said Department of Police, who was a superior officer of said patrolman. Hichael E. Egan, in the performance of his duty as roundeman -

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proceeding and the the state of the same and the same of the City of Unicago. Un Saptacher 17, 1824, he was natified to mid teringe show med bed search, tipe to it is and section of Ame solder, On whee , I make on the of her a , I am experient had do into logulations of the December of Police, presented and in force a palmerone forcess [1] constructions [4] cities of well-ways police officer. (3) lenuberdiastion or Abraspect toward a waparties of law . The sharper market in the real law . The court of the real law . on September 7, 1974, petitioner was found at the Sheeter Cab Sarage, \$502 Prondway, in an investenced condition by Sergeant Charles M. bushing of medicariors, and seat heat had added to welless M. they dainy and the absolute to meanth and to some and boult bee dail amegan 21 heaves end word . heaterth most was and has . hilv had these ag and asualt lang oil angreau scout to galrand out many heistloling has egalbeneers out tuonquored feature ve beinese in the can deathan of withnesses; that all the withness were swam mainstance estyred five out complies name more has be fillered has To BI how & . I migarmana mainicit to utiling committed out home Soction 1, Bule 30, Bules and Hagulablene of the Repartment of Palies, erecutive and in forms account a, 1816. (1) intentalwanthroughted to) stateling within a processing dynamic (it) and the grandy tongs ton present a superior selector, and specifically and forch that said politioner, a patrolana in the Holice Department of Chicago, illinois, and gned to the Bird District Police Station, on the sight of depression 7, 1924, was assigned from a 9. h., until 12 o clock, midnight, to guard suty at the Checker Cab barage, loosed at Sale Brackery, Chicago; that about 11 c'clock T. R., on Baptember 7, 1984, Gharles broller, forgenne of Palice of maid Description that Toller, who was a asperior striour of said patrologues. Michael M. Myan, in the parformance of his duty of roundenna -

started from Police Meadquarters, called at said Checker Garage at said street and number, and then and there found the said Michael M. Mgan standing at the door of said garage; that at said time and place the said Michael M. Mgan's breath smelt of interioating liquor, his knees were weak, he could not talk coherently, he was intoxicated and was in no condition to do police duty, and thereupon, at said time and place the said Sergeant Charles Mueller telephoned the said 33rd Police District Station to send the patrol wagon to the said Checker Garage; that while waiting at the said time and place for the arrival of the said patrol wagon, the said Sergeant Charles Mueller was standing at the entrance to said garage talking to an employee of said Checker Garage when the said patrolman Michael M. Egan then and there said to the said Sergeant Mueller, whom he knew to be his superior officer. "So you think you are going to get away with this?" and the said Michael M. Egan then and there pointed the revolver at the abdomen of the said Sergeant Euclier who immediately struck with his hand at the said revolver and at the same time the said Michael M. Egen pulled the trigger of said revolver, firing same, and the bullet passed by said Sergeant Mueller and the said revolver was knacked to the floor against the wall of the said garage; that the said revolver was then and there secured by the said Sergeant Euclier and the eaid Patrolman Michael M. Mgan was thereupon sent in to said 33rd District Police Station in the patrol wagon, and it was ordered that he be discharged from the Folice Department.

The record shows all the necessary legal steps under Sec. 12, Chap. 24, Cahill's Ill. State. 1929, par. 697, including the charges and specifications, proof of service, appearance of the accused with counsel, the evidence in the case and the finding that he was guilty. It is only where the jurisdictional facts do not appear of record that the Circuit court would be justified in

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quashing the record for want of jurisdiction in the commission.

(Funkhouser v. Coffin. 301 III. 257; People ex rel. Holland v.

Finn, 247 III. App. 53; Cord v. Coffin, 226 III. App. 326;

Buttimer v. Geary, 229 III. App. 524.) A reviewing court will not decide whether a Civil Service Commission decided rightfully or wrongfully in removing a policeman from duty, but only whether it had jurisdiction and did so in the legal manner. (People ex rel. Bitchell v. City of Chicago, 243 III. App. 100.)

It is also urged that the petitioner was guilty of laches. He was discharged September 25, 1924, and filed his petition for writ of certiorari on May 26, 1930, more than five years thereafter. (People ex rel. Holland v. Finn. 247 Ill. App. 83.) It has been repeatedly held that, where one is discharged by the Civil Service Commission and delays more than six months before filing his petition of certiorari, he is guilty of laches, which bars his right to have the writ issue. (People ex rel. Holland v. Finn. supra, and cases cited.) The judgment of the Circuit court of Cook county quanting the record of the Civil Service Commission is reversed and the writ of certiorari is quashed and the petition dismissed.

JUDGMENT REVENSED AND WRIT OF CERTICHARI QUARTED AND PETITION DISHIBSED.

Scanlan, P. J., and Gridley, J., concur.

Time, 847 lil. Arp. 83; Gord v. Garrin. 828 lil. App. 838;

Ling v. A. 219 lil. Arp. 83; Gord v. Garrin. 828 lil. App. 838;

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Roanlan, P. J., and Gridley, J., concur.

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ADCHASTS AND MANUFACTURES SECURITIES COMPANY, a corporation,

Appellant,

V+

JOHN DUFFY and MRS. JOHN DUFFY, also known as Margaret Duffy. APPEAL FROM MUNICIPAL

261 I.A. 6414

MR. JUNTICA KARMER BULIVERAR THE OPINION OF THE COURT.

Ennufacturing Securities Company, a corporation, obtained a judgment for \$342.46 against the defendants, John Suffy and Mrs. John Suffy, upon a judgment note. In defendants' motion the judgment was opened and they were given leave to defend, the judgment to stand as security. The cause came on for hearing on April 23, 1930, and the defendants not appearing, the court adjudged that the judgment as confensed against the defendants on January 19, 1928, stand confirmed. On July 29, 1930, the defendants filed a petition requesting that the order of April 25, 1930, be vacated and set aside, and the court on July 30, 1930, vacated and set aside the order. The present appeal followed. The defendants have not here filed any brief.

From the petition filed by the defendants in support of their motion to vacate the erger of april 13, 1930, it appears that on November 12, 1929, the plaintiff agreed to compremise its claim against the defendants; that they interviewed one Henry P. Kranz who held a mortgage on their real optate, who promised them that when the lean natured he would increase some so as to enable them to pay the amount due plaintiff, and that defendants agreed to pay plaintiff



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on October 16, 1930, and they stand ready are able to carry out their agreement, and that they had been informed by their attorney that this cause had been dismissed. Courts, in the interest of justice, exercise a liberal discretion in the matter of vacating a judgment entered by confession and allowing a defendant to defend, yet such discretion must be reasonable. The petition in the instant case dis not set forth grounds which would be sufficient to vacate the judgment in a court of equity.

No legal grounds for vacating the judgment appearing from this record, the order of July 30, 1930, will, therefore, be reversed.

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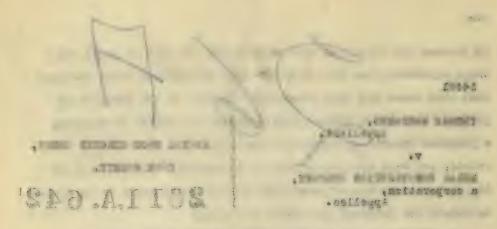
MORAN CONSTRUCTION COMPANY, a corporation, appellee. APPEAL WROM CINCUIT COURT, COOK COUNTY.

2011.A. 642'

MR. JUNTIC: KARBIR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendant to recover \$4,000 for commissions claimed to be due him from defendant. At the close of the plaintiff's case, there was a directed verdict in favor of the defendant and judgment was entered on the verdict and plaintiff appealed.

The plaintiff filed a declaration consisting of the common counts and a special count in which he alleged that on February 4, 1927, he entered into an oral contract with defendant whereby it was agreed, that if plaintiff would procure for defendant a contract by which defendent would be employed to suild a flat and store building in Chicago, defendant would pay plaintiff as compensation for his services in procuring said contract, the sum of \$4,000; that on February 23, 1927, plaintiff did in fact procure for defendant said contract and thereby defendant became indebted to him for \$4,000. lefendant pleaded non assumpsit and filed an affidavit of merits in which it claimed that plaintiff said he was in a position to procure a contract for defendant to erect a flat building and would do so. on the condition that defendant would pay plaintiff out of the net profits earned from said building contract such compensation as the defendant deemed reasonable and fair, but that if there were no profits earned, plaintiff would receive no compensation; that there were



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Nightiff brouchs on action of assumptit against the defendant to recover 46,000 for consistence claimed to be due him from defendant. It the class of the intentialities came, there was a directed version in favor of the defendant and judgment was entered on the version and plaintiff appealed.

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no profits, and therefore defendant is not incebted to plaintiff.

The evidence discloses that plaintiff was in the business of building, selling and trading real estate; that defendant was engaged in the general contracting business; that early in January, 1927, Walter Moraw, secretary of the defendant, and plaintiff had a conversation in which Moraw employed plaintiff and agreed that if plaintiff would procure business for the defendant through his connections among builders and property owners, it would pay him a fair commission. In February, 1927, plaintiff brought in plans and specifications for a building which one John Vasilepoulos proposed to erect in Chicago. The job was estimated and a price agreed upon. Moraw agreed with plaintiff that if plaintiff could procure for defendant a centract with Vasilopoulos for the erection of the proposed building, defendent would pay plaintiff as a commission \$4.000 when the job was completed. Is a result of the efforts of plaintiff the contract was procured. The evidence further shows, that plaintiff had been acquainted with Vanilopoulos before he was employed by defendant, and that Vasilopoulos knew that plaintiff was employed by defendant. It also shows that Vasilopoules did not know the amount of commissions plaintiff was to receive from defendant. The contract price for the building was \$62,000; of this \$3,000 was to liquidate existing encumbrances; the balance of \$49,000 was arrived at by defendant adding to the estimated cost of the building, the commission of \$4,000 to be paid to plaintiff. Written contract was entered into between defendant and Vasilopeules, and the building was in fact completed by defendant under the contract procured by plaintiff.

At the close of plaintiff's case, the trial court directed the jury to find the issues for the defendant, and expressed the opinion that plaintiff and defendant had entered into an agreement to defraud Vasilopoulos out of \$4,000, and therefore plaintiff was not

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that evidence discloses that plaintiff as a six business now conservate chair has been part outland but for her hand and being the . had tributed me , community and the graduated property and for the . he had being the "Mindafe beingow until detain at Molfastrymor plaintiff would procure hunthese for the defence at through his our obtana meany ballders and property orners, is would pay him a and section of Polyments, 1919, visiall' brought in plans and become and only and her with the Main maintain a new amazinaly seeds stone betwee making a rate behalf for they was not contacted at young at ... sal sewerny there Thicking to had blinkers XII- beenge again. were not be controved out and anterpolitical thire Paradona a Analombah DOO, so make lames & an Trituint pay bloom controlled and affect some Tringing to advolve and to study a si , bushiques and dot end work called That are provided the relative statement are forthern all ind been capacitated vick Vacilacevilas before he me annioped by bounded and highway had not adjusted but has presented and word don tib nothernitary Jana trong sale at . . Inchmotth ye and control was planning was to receive the anticipance by fillens contract price for the builting one file, shot of this la, not east bysitts and dec. 866 to seemate of the section of the last stability if off against and to your interest out as person described up de - Partition and less a will desirally at hims of our companies on an annual last substitutions galbiled odf the solventier bon technoles soorded adul brushe new of despects fortilles ad a clear Bulletter of delegans duck at also

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entitled under the law to any compensation.

Vasilopoulos out of \$4,000, no action could be maintained thereon, but it is contended that there is no evisence of fraud. John

Vasilopoulos was of full age; he was mentally competent and experienced in business and knew the plaintiff was employed by the defendant and, so far as the evidence in this case shows, he willingly and without any misrepresentation of any kind on the part of plaintiff, entered into a written contract by which the defendant was to creet a building for \$52,000. A contract for an agreed compensation or commission upon business brought to a firm is not illegal.

(Vocke v. Petera, 58 Ill. App. 338; Burnett v. Potts, 236 Ill. 499, and Lamb v. Ponlinson, 261 id. 388.) If plaintiff was guilty of fraud the facts should be presented to a jury for them to pass on.

The judgment of the Circuit Court of Cook County is reversed and the cause remanded.

REVERSED AND REMARDED.

Scanlan, P. J., and Gridley, J., concur.

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EDMARD T. SPEAKMAN, Appellee

V.

BILLWYN B. BELA. Appellant.

COOK COURTY.

261 I.A. 6422

MR. JU. TIG. EMERIN D. LIVING THE OPINION OF THE COURT.

This was an action in assumpoint brought by plaintiff Edward T. Speakman against Billwyn E. Bell for money loaned, heard by a jury, a verdict for plaintiff for \$2661.15, and judgment on the verdict from which defendant appealed.

Plaintiff's declaration consisted of five counts, alleging that the plaintiff loaned defendant on June 1, 1923, \$2500, which defendant agreed to repay within three months, with interest at six per cent. The third count in addition states that subsequent to making the loan, defendant handed plaintiff a promissory note, signed by defendant as president of Presed Steel Equipment Company, due three months after June 1, 1925, but that thereafter on May 14, 1928, denied that the loan was other than a personal loan to defendant. The defendant pleaded non assumpsit and the statute of frauds to the third count.

The plaintiff's evidence discloses that on June 1, 1923, he drew his check for \$2500 payable to the defendant, which he claims he loaned to the defendant, the defendant stating he desired the loan with which to pay his household expenses, the loan to be repaid in ninety days; that check was indorsed by defendant to the Pressed Steel Equipment Company and by that company deposited in the Central Trust Company, with whom it banked; that the defendant

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that thereafter on May 16, 1993, denied that the loss was athur
than a personal loss to defend at. The sefendant pleaded non
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The plaintiff a cridence disclose that an June 1, 1023, no dres his check for 12200 payoble to the defendent, which he claims he lossed to the defendent efection he acaired the loss which to pay his increased expenses, the loss to be repaid in nimety dayof that check was inderest by defendent to the Present to the Present to the Present to the Control Truck downsay, with when it benkeds that the defendent

gave plaintiff a note for \$2500, payable to plaintiff, signed "Pressed Steel Mquipment Co. By D. M. Bell, Pres."; that plaintiff did not know it was a note until he arrived at his home, but did nothing about it; that on June 11, 1924, defendant delivered to plaintiff a check of the Fresaed Steel Squipment Company, payable to plaintiff, for \$650 to apply on account of said loan and that no other payment was ever made on the loan; that plaintiff never loaned any other money to the Pressed Steel Reulement Company, but had on one occasion, about a year or two before June 1, 1923, discounted a note for \$2900; that in 1920, he purchased \$1000 worth of stock of the company and a year later \$500 additional. The defendant is the president of the Pressed Steel Equipment Company and plaintiff is a Defendant's personal bills were at times paid by stockholder. checks of the Pressed Steel Equipment Company. Defendant's version is that he advised plaintiff the company was in need of capital and that he requested a lean of plaintiff for the company, and that it (the company), gave plaintiff its note to cover the loan; that he personally never borrowed the \$2500, and that the repayment of \$650 was made by the company. A. Mitchell testified for the defendant that he was a stockholder of the Pressed "teel Rouip ment Company and that he had a convergation with plaintiff in which plaintiff said he had helped the company occasionally. but was not sure as to what form his transaction took.

The defendant contends that the question for determination was, to whom was the loan made, and there being merely the testimony of the plaintiff and the denial of the defendant, the plaintiff cannot recover. In the case of <u>Nills & Co. v. Luke</u>, 232 Ill. App. 277, 280, the court said:

"Where the controlling point in the case is supported by the testimony of one witness and contradicted by another witness who, from the reading of the printed page of the record, appears

pouric alliutole of old yes autoff rel come alliminiq even Transfer out of large and it is not been proved the property bib and gowed aid an horizon on lithus ofon a new at word for bib setting open its that so Jess II, built orthodomy delivered to efferer , manual succession in the first become and to deale a "Wishial" on such less many halos, he converse as whose an wind part attachments as begned towns this mistly sould town full me of our reve ear determine the le an had tent averaged larger light house, and he gives table the a bedracent's alless of bear washed out or young a panels and one of and to proce to give be their or previous limit our the source of the ar and a year later \$1000 achiebanl. The defounts in the a of Trisminde has unequal sample of feeds, beauty and to smoblesta adoptions . Defendant's personal bills vare at times peld by sheets of the Spaness Spatisment Laurence Control of the schools the fatigue to hear at any grammes out literally bestyle ad fast at of deal has emeasure and not attimisty to used a reducepor of today (the company), you while its well to a new one the loans that he Det le deserge act that had the . \$500, and that regarder to designation and will be a property of the party of the new that he was a stockholder of the Fregued Stock Rauly ment Company and ed blen Priestala datio at Tribulay ditto salcon erson a bad of fadi tade as an equal the ere and entity, but the ball ball form his transmertion took.

The defendant combands that was question for determination was, to whom we did less made, and chore being merely the testiment of the plaintiff and the denial of the defendent, the plaintiff connect recover. In the case of Ville & Jo. v. Juke. 252 Ill. App.

the property of the contract of the last to be the property of the property of the contract of

to be equally credible, a court of review is not warranted in disturbing the vertict of the jusy, because under the law this court cannot disturb the verdict of a jury unless it is clearly against the manifest weight of the evidence. The question of the preponderance of the evidence does not arise at all in this court. There are many things which a jury observes on the trial in such case that do not appear from the printed record - the appearance of the respective witnesses, their manner of testifying and a great many other circumstances. They are in a much better position in such case to determine the truth of the matter in controversy than a court of review."

See also <u>limer v. Miller</u>, 25% Ill. App. 465, and onsee citee. Iter examining the testimony in this cause, we would not be unreasted in holding that the vertical is against the manifest weight of the evidence.

It is assigned as error by the defendant, that the court admitted improper evidence and excluded proper evidence. in counsel's brief, he states "there are numerous such admissions," and he complains that plaintiff was permitted to at the the purpose of the 4650 payment which was made at the Graceland Cemetery. It is not denied that this payment was made on the loan, but because the plaintiff apoke of his daughter's death, defendant claims he was prejudiced. Te have examined the record and find that the testimony with reference to the circumstances of this payment was not objected to until plaintiff's counsel offered the check payable to the cemetery, and this condition of the record does not justify reversal. There was no error in admitting a letter from plaintiff to defendant in which plaintiff stated that since he saw defendant at the Club, when defendant stated he would repay the loan plaintiff made defendant on June 1. 1923. he (plaintiff) was reminding defendent of his promise, and defendant's reply in which defendant stated, that he had refrained from answering plaintiff's letter because he did not know what he was going to be able to do about the business or anything class, and that he would be able to tell plaintiff definitely, by the leth or 20th of the month. Over defendant's objection, plaintiff testified that three weeks before the case was tried, defendant asked him to have the case continued for about two weeks and by that time he might have some money to take care

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of the obligation. Admissions or statements of fact are evidence. (Hook v. Bunch, 180 Ill. App. 39.) We have considered the remaining objections of the defendant to the admissions of what he claims improper evidence and the exclusion of proper evidence and find no error therein.

A further contention is made that the court erred in refusing an instruction tendered by defendant which told the jury to
disregard the testimony of the plaintiff with reference to the conversation in which defendant was supposed to have said, that if the
case was continued defendant would have money to take care of the
obligation. In view of what we have said above, there was no error
in refusing this instruction.

We think none of the errors assigned calls for a reversal of the judgment and secondingly it is affirmed.

AFFIRMED.

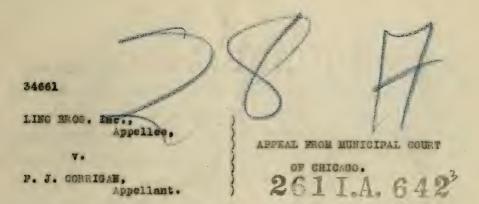
Scanlan, P. J., and Gridley, J., concur.

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MR. JUNTION KROWNED BLIVINGS THE OPINION OF THE COURT.

April 18, 1930, plaintiff obtained judgment against defendant for \$490.50, being rent commencing January 15, and ending April 14, 1930, at the rate of \$140 a month, plus attorneys' fees, by confession, on a cognovit in a lease. Subsequently defendant moved that the judgment be vacated and filed an affidevit in support of his motion. This was denied and from the order denying the motion defendant appealed.

The lease is in writing and under seal, for an apartment at 2730 Pine Grove avenue. Chicago, and demises the premises for a private residence or dwelling for one year commencing January 15.

1930, the defendant agreeing to pay \$140 a month, the lease providing inter alia that the "lessee has examined said premises prior to and as a condition precedent to his acceptance and the execution hereof and is satisfied with the physical condition thereof, " " and agrees and admits that no representations as to the condition " " has been made by the lesser or his agent, which is not herein expressed; " " and likewise agrees and admits that no agreement or promise to decorate, alter, repair or improve said premises, either before or after the execution hereof, not contained herein, has been made by the lesser or his agent." By the

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The lessed is in writing includes soul, for an apartment of 2730 Pine Grove avenue, Chicago, and demiese the president for a private residence or unciling for one year consecution demany is, providing inter alia that the "lease has exactled suid premined yeter to and as a condition precident to his acceptance and the association hereof and is activities with the physical consistent the condition of the chart of the physical consistent the condition of the physical agent, which is not herein expressed; a send likewise agrees and admits that is not herein expressed; a send likewise agrees and admits that an agreein expressed; a send likewise agrees and admits that he agreein expressed; a send likewise agrees and admits that herein, has been made by the lawer as his agent." By the herein, has been made by the lawer or his action to contained article by sefendent in suppost of his motion to vaccute the

judgment the defendant asserted that the lease is only a part of the contract between defendant and the repurted owner of the building, Mrs. .. . Clutter; as a part of said entire contract the said owner agreed and promised to furnish completely the said apartment for occupancy by defendant as a condition precedent to defendant even considering leasing the premises; said pretended lease and agreement to furnish said apartment were one indivisible contract, each essential to the validity of the other, and the total rental agreed upon was \$175 a month, allocated \$140 a month as rental for the premises and \$35 a menth as rental for the furniture; that said alleged lease was intended to be and is a fraud upon defendant; that the owner neglected, delayed and refused to install any furniture in said apartment as she had agreed to do and never furnished the apertment in accordance with her agreement; that by reason of lessor's failure to furnish said apartment as agreed. defendant was unable to occupy said spartment and never occupied the same; that no rental whatever accrued under said lease because the said lease and the said contract for furniture. which was a part thereof, were never carried out by the owner, and therefore the consideration for anid lease entirely failed.

The defendant claimed that the lease attached to plaintiff's statement of claim is "only a part" of the contract and that the omitted portions may be established by parel testimony; that if the judgment in the instant case be set aside and vacated he would prove the facts above stated in his affidavit. The lease in the instant case is under seal and purports to embody the entire agreement of the parties, while the parel agreement which the defendant sets up in his affidavit is inconsistent with the express terms of the lease. The lease is plain and unambiguous and covers the rental of an unfurnished apartment. The statement in the

induced the defendant exercises that level its andy a pert of the contract between defendant and the repurted senses of the building. Mra. p. ". Clasters as a port of said entire contract the and owner agreed and promised to furnish completely the said apartment for security by original as a condition procedure to Astrodoug Mos greeners but astered principles were Inches and aldialythat amy even sucretage blue deigned of dusposting bue searly contract, oner caceastal to the pullity of the ciber, and the the contract the same of the state of the st our and not ladger as donou a dil bus a constant to the tar-Appet a at he so at before in the sense and to be send to be suit to will of bouster has begalab shoosigon names out todd tombooles muc ab od brenze bud one an incontraga blue al evertural yan . Inc. er arres usuiqued the apprisont in accordance with her agree--transmission and Lement of the state of the state apart. has limited the coupy of all mes unante to ecopy with a remember and Mine thing buffers totalogs (if are an info power will believe total loans bearing the and least the said bear farming three largests which was a part thereof, you apper entried out by the coner, and tolial glocians canal bios for moisstable and acarereds

The defendent claimed that the lease attached to plain.

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affidevit that the entering into of the lease was upon the express agreement that leaser would furnish completely the apartment for occupancy, involves an enlargement of the terms of the written contract. Farol evidence cannot be introduced to vary or contradict the express terms of a written contract, complete and certain in all its terms and purporting to embody the entire agreement between the parties. In the case of flora v. Griebel, 136 Ill. App. 399, the court said:

"All contracts in some sense are verbal contracts before being reduced to writing. Their terms and conditions sust be talked over and agreed to, but when parties have reached an understanding and embodied their agreement in an instrument under seal, that instrument must be, not only the sole evidence of their contract, but in the absence of fraud or mistake, no parol agreement antecedent to. contemporaneous with or subsequent to its making can be used to vary, extend or modify any of the essential features or extend the liability of any of the parties thereto. Then a centract is reduced to writing, all matters of negotiation and discussion on the subject, antecedent to and dehors the writing are excluded, as being merged in the instrument, unless offered to overthrow the contract as being fraudulent or illegal.' 2 Kent's Com., 586. 'No verbal explanations or stipulations will be permitted to vary an agreement in writing; and negotiations between parties, prior to or contemporaneous with the execution of an instrument, are merged in it, and cannot be reconsidered. Thus extrinsic evidence is generally innomissible to show that the lessor at the time of executing a written lease, promised to repair or to supply deficiencies in the furniture of the leased premises. Taylor on Landlord and Tenant, section 44. It is well settled, 'that a written contract, unambiguous in its terms, cannot be varied, contradicted or modified by parel evidence of anything that occurred at or prior to the time when such written contract was executed.' 11 am. and Eng. Yncy. of Law, 2nd ed., page 548. In Telluride Power Co. v. Crane Co., 208 Ill. El8, the upreme Court said: 'The rule is that when the writings show, upon inspection, a complete legal obligation, without any uncertainty or ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included in the writings. 'A written contract, if unambiguous in its terms, cannot be varied, contradicted or modified by parel swidence of conversations relating to the subject matter of the contract, which occurred between the contracting parties before the execution of the contract. (Town of Kane v. Farrelly, 192 Ill. SEL.) For can a scaled executory contract be altered, changed or modified by parol agreement. (Alschuler y. Chiff, 164 Ill. 298.) Sobneider v. ulser, 212 Ill. 92."

See also Friedman v. Schwabacker and Schwabacher, 64 Ill.

app. 422; Stafford and Stame v. Fard. 204 Ill. App. 582; Lord v.

efficient time time antering late of the locus was upon the unit for occupancy, involves an entercase of the term of the vary or valted to entercase to vary or certain in all its terms and parperlies to embedy the entire agreement between the parties of ourse of the entire agreeming the parties. In the case of the variety, late in the case of the court said:

MALE STREET eding reduced to write. Joseph Liver being decembed and in the Publication along building being Justice that to comblet also all the les and less farmerisal handings contact in a highestania wir wat the wait arent in a 10 p. 10 p. 10 p. us to the contract of the second weather the second as being moliganique invier et . SCI ... 'I ... 'I. ... III .. M. W. T training of the state of the st which is dealer to all the beginning and beginning that the ic all all the wall a fill all all all area of account a fill a get a country the best in the the time of entering a written leads to the president to depote of to expelse deflicted to the torstone of the length Live at at . to make our general of the first terms of the relations of th so to the control of the set of the control of anything to and investment and Figure Waste with with the of thing to be because of casequeed. Il has mad long, lander of Lone and edit, pages belle la the surject on the state of the surjection of the surjection of und mi natural are anistruct and lo in the contract of the contract former games at all groundingers light of the all the Ad companies guarded on the said said and its and the said of the said of the said of the design of the miles of the calcount of the contract of the calcount of the relucionte) . insues una fecar ya bellibes se beganio . Tolla es destino V. Febill. 168 flie Eve.) Townsides v. when all flie Dis-

See also Friedman v. chambacker and Commbacher, 64 111.

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Haufe, 77 Ill. App. 91; Lloyd v. Sandusky, 203 Ill. 621; Fuchs & Lang Mfg. Co. v. Kittredge & Co., 24% Ill. 88; Seitz v. Brewer Refrigerating Co., 141 U. S. 510,

The defendant contends that there was a misdescription of the parties to the lease, in that the action was brought in the name of Lino Bros. Inc., and not in the name of Lino Bros. Inc., Agts, as lessors named in the body of the lease. We are of the opinion, the defendant having signed the lease is bound by it.

(Nontange v. Wallahan, 84 Ill. 355.)

The judgment of the Municipal Court is affirmed.

Scanlan, P. J., and Gridley, J., concur.

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34679

MARY LARROWSKI, (Gross defendant), Appellant,

V.

JOSEF LASKOVSKI, (Gross complainant), Appellee. COOK COUNTY.

261 I.A. 6424

MR. JUNTICH KORNOR DELIVERED THE OPINION OF THE COURT.

On January 51, 1928, Mary Laskowski filed a bill for divorce charging Josef Laskowski with cruelty. He answered, denying the charge, and on October 4, 1938, filed a cross-bill in which he charged that Mary Laskowski committed adultery on Wovember 15, 1927, with John Doc, whose true name is unknown. On June 13, 1929, Mary Laskowski dismissed her bill. After hearing the evidence on the cross-bill, the court entered a secree finding Mary Laskowski guilty of adultery with John Doc on November 15, 1927, and granted the cross-complainant a divorce. From that decree cross-defendant appealed.

Lecember 1, 1927. Both of the perties had been married before, each having children by the prior marriage. There were no children born of this marriage. Upon the hearing on the cross-bill and answer an attempt was made to prove Mrs. Lackowski guilty of adultery with a person whose name was unknown. There was no direct evidence as to any act. The record fails to show sufficient proof that Mrs. Lackowski was guilty of adultery with John lee as found by the change is given by the doughter of Josef Lackowski and her friend, both of the girls being about eighteen years ald; they testified that an Movember 15, 1927, about seven o'clock in the evening, they are Mary Lackowski

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Indeeder 1, 1927. Note of the perties had been married before, been invine children been for the perties had been married before and invine children been for the marriage. There were no children been of this marriage. Upon the bearing on the erose-bill and aniver an actions was rade to prove bro. Lankewski redity of adultery with a person when can not consecuted with the second when a second full to a person the first file second fully of acutory with least was not direct evidence an lankewski was ruthly of acutory with John too as found by the chanceller. The sair terinous temin to suggest the charge is chanced being the charge is given by the sixten to sair terinous teminer along the charge is sixten by the sixten town by the distance of dense class that friend that friend and forwands when the second stant about along the time the second. Second they are lary Lackwoold.

walk into the boarder's budroom, closing the door, where she remained half an hour, and when she came out her hair was mussed and her face flushed, and she walked to the bathroom; that the boarder afterwards came out of the bedroem and he, too, walked into the bathroom; he had his trousers on but no shirt; that Mary Laskowski before she entered the bedroom knew the witnesses were in the parlor right off the bedroom, and that during the time they were in the beeroom they heard no talking, it was quiet. It further appears from the evidence that this boarder, whose name is not known to any of the witnesses, lived in the flat occupied by the parties some nine days to three weeks, cross-complainant's daughter testifying that he was there three weeks and was brought in by Mary Laskowski, while Mary Laskowski says he was there but nine days and was brought to the flat by crosscomplainant's daughter, after November 15, possibly about November 23. It further appears that the dughter told her father on November 17, the story as related by he on the witness stand; cross-complainant did not, however, accuse his wife of being unfaithful at the time she left December 1, 1927. At the date of the hearing Mary Laskowski was 46 years of age, had been married to her first husband twenty-two years and was the mother of seven children. The denied the charge against her. lines separating from her husband she has been living within a short distance of him, he residing at 2405 and she at 2449 Touth California avenue, Chicago. There was no evidence that the boarder has ever been seen in her company or at her home after she left defendant's home.

The charge of adultery may be established by showing circumstances which raise the presumption of cohabitation and unlawful intimacy (Carter v. Carter, 182 Ill. 434; Zimmerman v. Zimmerman, 242 id. 552; Jones v. Jones, 114 Ill. App. 201), and the charge need be proven only by a preponderance of the evidence. (Itiles v. Atiles, 167 Ill. 576; Lenning v. Lenning, 176 id. 180.)

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was asia seeks a back and and and and a seeks all the became now that you ive your will sent her a word on hind benton of the flugher, and the walked to the bethroom; thet the bearing offerential was not at the bearing and her, but, while their the bathreony be had bit irrowing on but an object bind thing healership caffing all all over established beat an order out between our cupted party orange and the state on the court of the box and the course and he upo of mound for at owns touche, beinged with full casedly and singulars, liked he the first summined by the purples were wind drops to bigue washing grammaning in the confident for the light bas was there Name of the Art and the Art and the Art and Ar was no nd Jaff silv of Injuryd our bno cy b talk jod event car ed even confinitedly a factors, after bremer 14, penthin that Brember 11, . VI tedament in colurs our also readered out that the state of the story as related by ha: on the withres stand; erous-complainant and and the court and the color of the color of the cine of the color ler's Lecender 1, 1937. 'S the date of the her ring Many Lankewski was id yours of age; but been corried to her first husband toruty-has yours and was the mather of seven children. The dealed the charge and not hard the according too busings also had led to been light within done the take the call the continue of high to constain a class a DESCRIPTION OF THE PARTY OF THE REAL PROPERTY AND ADDRESS OF THE POLICE OF to ever been tone to be you couper ton it were need tove a de

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intimety (Server v. Series, 183 III. 486; Cidentres v. Timetrano.

Set td. 560; Server v. Javier 184 II. App. 201), and the charge need
but graves andy by a proportranou of the evicance. (Tilles v. Iellyra.

The accused party is presumed to be innocent of the charge of adultery and this presumption of innocence continues until convincing proof sufficient to overcome it is presented. (Gvenu v. Ovenu, 201 III. App. 607; Carter v. Carter, 62 III. 439; Blake v. Blake, 70 id. 618; Noef v. Hoef, 323 id. 170.) In Whitlock v. Shitlock, 268 III. 218, referring to a charge of adultery, the court said:

"Then such a charge is made it involves the character of both parties to the offense, and the character of the woman, to whom it is of priceless value. The should not be found guilty on evidence which may as well import innocence as guilt."

we are mindful of the rule that a court of review will not disturb the findings of the chancellor unless such findings are clearly against the weight of the evidence. Still, the instant decree rests upon merely circumstantial evidence. Mary Laskovski's denial, with the other circumstances in the case, in our opinion, present a sufficient defense to the charge made by the cross-bill. For the ressons indicated, the decree is reversed and the cause is remembed with directions to dismiss the cross-bill for want of equity.

REVERSE: AND REMARDED WITH DIRECTIONS.

Scanlan, P. J., and Grieley, J., concur.

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ARREST PLANTING AND PARTY AND PROPERTY.

34691

ELSIE L. MYSTROM, (cross-defendant), Appellant,

W

ALBINT H. RYSTROM, (eross-complainant), Appellee. APPEAL PROM CIRCUIT
COURT, COCK COUNTY.

251 T.A. 642

MR. JUNIOS KOUNDE DELIVERED THE OFFICE OF THE COURT.

alleging that on June 29, 1934, the defendant, without any cause or provocation on her part, left her and has since refused to live and reside with — or provide her a home and that she is living separate and apart from the defendant. The defendant snowered, denying the charge and filed his cross-bill, in which he alleged that his wife was guilty of wilful desertion, without any reasonable cause, for the space of more than two years; the wife denied this charge, replications were filed to the answers. A trial was had resulting in favor of the defendant, and the court dismissed the original bill and under the cross-bill granted the husband a divorce on the ground of desertion. Complainant has appealed to this court and asks a reversal upon the ground that her bill is supported by the greater seight of the evidence, and that the decree is against the clear prependerance of the evidence.

From the record in the instant case it appears that the parties were married on January 29, 1923, and lived together up to the month of June, 1924. It was complainant's third marriage and defendant's first marriage. Immediately after their marriage defendant expended \$1200 in the purchase of furniture, and with some furniture that the wife had the parties furnished an apartment where

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they resided for about one year. Defendant was employed as a carpenter, earning 560 a week. During the time they occupied the apartment there were no difficulties or differences between the parties. After the expiration of one year they vacates the apartment, stored the furniture in the name of the wife and moved to a room in a hotel, living thus for about two months. The room in the hotel having no both or facilities for cooking or housekeeping the parties ate their meals in a restaurant. There is no complaint by the wife of any mistreatment or neglect by the husbane while they lived in the hotel room. It is claimed by defendant that his wife became tired of housekeeping and performing her household duties and that he consented to move into the hotel room to avoid any differences or quarrels with his sife; that after two months because of the character of his employment and the lack of home facilities and comforts he told his wife to rent a flat and place the furniture in it, which she refused to do and tele him that she was going to stay in the hotel, that he could do as he pleased. Defendant left the hotel but continued to support his wife at the hotel for two months. Complainant testified that when her husband left her he gave as his reason, "he dien't want to support her, that he wanted to live independent," and that after he left her she telephoned him at his mother's home and asker him to come back and live with her, which he refused to do. all of which is denied by the husband. On the other hand, the defendant testified that his wife told him, "she was tired of keeping house; that she would put the furniture in storage and move in a hotel, to which he objected, saying that it was no place for him as he was a working man, working at the steel mills, would come home black and would be ashamed to go into the hotel, but that he consented to the arrangement and later told her

they emitted for short one process infraring our dends on bettiers and hadables that he'r mir golden. After a till palation attelling of the problem. other the registration of our year one waither the agartment, stored the turnibure in the name of the edd morad ha al move out a moter, living than for about an mondia it mer a ingles and an entries of the contract to dead an entract attack and in parties at a the contract a meanage in an entract. by the wife at may minimum up touching by the boundary that they Lived in the battle stem. It is calcade by desendant the blank his wife waites bladeseed red patters may have pall to the best better the Storn of mer forest set of all trem of beginning all fant ban suprest added on payment the view that the city of adding the passenger and Address to the Park and the Control of the Control of the Andrew of the Andrew of the Control of the Contro savelers and sould has out a susa as othe and blod on statues of as auton any one soft mid blad but the control and Maldy jet at they is the heigh, that he could be be absenced. Defeated laft and and Ledon one to other and energies as hearther and ledon one of red first business and main a me chairle of amadalque's before of July , and treeses at Juny Just but sensor ald an aven mid beautyplat ada vad thei ad tothe I il one ", dechaquai pull as and fifty ovil has don't see at all lakes an expet straites and in which he refused to do, all of ented by the bushand. one" sind blos wis and a calliant to add the blos wis sind of mi samulanu't mis sug himor suis sams games galgest la barif sam storage and maye in a hatel, to which he objected, negling that it Lucia vet to painter and painter a and of a mid tol sorie on and mills, would come be be and some or a change on the fire the notel, but that he conseners to the appropriate and later told her that that was no place for him; that he desired to move back into a flat, which she refused to do;" that after they separated, he had two conversations with her in which he requestes her to come and live with him in a flat, which she refused to do, which is denied by the wife.

The record before us presents for our determination questions of fact. There was sufficient evidence on which to base the findings of the chancellor, and whether such evidence clearly prependerates in defendant's favor depends altogether upon the credibility of the witnesses, whom the opportunity to see as well as hear gave the chanceller a facility not possessed by us. one which has been referred to as of the greatest importance in determining the weight and credibility of evidence. (Coari v. Disen. 91 Ill. 277; Johnson v. Johnson, 1.5 id. 518; Forter v. Forter, 162 id. 398; Columbia Theatre v. dait, 211 id. 122; Moore v. Moore, 335 id. 817; Doyle v. Foyle, #68 id. 96.) The husband has the right to select his domicile, and to change his residence, and it is the duty of his wife to accompany him, and if she refuses to go with him, he will not be bound to afford her a support and maintenance while and thus remains away from him without fault on his part. (Babbitt v. Babbitt, 69 Ill. 277; Houts v. Houte, 17 Ill. App. 439.) To justify a wife in leaving her husband, and absenting herself without giving him cause for divorce after the statutory period, his contact must have been such as to authorize a divorce in her favor. (Carter v. Carter, 6: Ill. 430.) The complainant had the burden to show that she was living separate and spart from her husband without her fault. (Kingman v. Kingman, 150 Ill. aps. 456.)

The chancellor saw the witnesses and observed their manner and appearance upon the witness stand and was better able to determine the weight to be accorded to the evidence of each witness. Their

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fairness and candor, their prejudice and feeling, or the reverse
if such existed, were apparent to him. The credibility of the
witnesses and the reight to be given their testimeny are so largely
matters resting with the chancellor that his conclusions upon the
facts will not be disturbed unless the record discloses that such
conclusions are manifestly against the preponderating force of the
evidence, and from this record we cannot say that the chancellor
erred.

erred in directing her to deliver up to the defendant the furniture and household goods purchased by the defendant. It is edulated by the complainant in her testimony that the defendant did purchase the furniture. To therefore find no error in the decree directing her to turn over to the defendant the said furniture.

We think the record is free from reversible error, that the decree of the Circuit Sourt is sustained by the evidence, and it is therefore affirmed.

AFFIRMAD.

Scanlan, P. J., and Gridley, J., conour.

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LEON L. LOBHR, Administrator of the Betate of Albert Dickinson, deceased, (successor to Churlet S. Quintam, Executor of said will). Complainant,

YS.

ENHA BHNHAM DICKINSON et al., Defendants.

CHICAGO HISTORICAL GOCIETY, Appellant, APPEAL PROM SUPERIOR COURT OF COOK COUNTY.

ER. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal by the Chicago Mistorical Society from a decree construing the will of Albert Dickinson, deceased, brings that instrument to our attention a second time. In Boyles v. Dickinson, 249 Ill. App. 647, we construed the fourth clause of the will containing a bequest in favor of Charles Dickinson Boyles which the present record discloses he has permitted to lapse by voluntary election not to comply with its conditions. The decree from which this appeal is taken was entered upon the supplemental bill filed by the administrator de bonis non with the will annexed. The occasion for further construction of the will arises out of the fact that it now appears probable that the assets of the estate will be found insufficient to pay in full all the legacies bequeathed, and the court was therefore asked to direct the trustees whether it was the intention of the testator that in such case certain of the legacies should be preferred to others and paid in full to the exclusion of any or all the rest, or whether in such case certain legacies should abate pro rata.

It is conceded, as all the cases hold, that the sole object of construction must be to ascertain the intention of the testator as the same appears to be expressed in the whole decument.

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it to conceded, we all the easen hold, that the well of the selvention of the teather of the teather we the same appears to be expressed in the whole decument.

The last will and testament of Albert Bickinson, deceased, consists of two writings: (1) his original will, executed on June 29, 1920, which contains nine articles; (2) the codicil thereto, executed on October 27, 1923, which contains five paragraphs.

Just debts, funeral expenses and taxes of all kinds. Article II makes specific bequests to the testator's wife. Article III devises an interest in certain real estate to the testator's nephew, Charles D. Boyles. Article IV makes a bequest to Boyles under conditions which, as already stated, he elected not to fulfill, thus causing the same to lapse. Several items, however, appear in this article, one of which may be useful in ascertaining the intention of the testator. The second paragraph of said Article IV provides:

"Upon the death of my said nephew this trust chall cease as to said fund, and said Trustees, or the survivor of them, shall pay, deliver and convey said fund, together with all accumulations thereon unexpended, share and share alike, to those corporations which are the legatees and devisees of my residuary estate as hereinafter provided; provided, however, that if all or a part of the legacies and bequests made in Articles V and VI of this my will shall not have been paid in full, said trust estate shall first be applied to the payment of said legacies and bequests in the same manner as if this trust estate had constituted part of my general estate at the time of my death."

By Article V the testator gives specific bequests to certain cousins, nieces and a nephew; creates a trust of \$50,000 with directions that the income shall go to the testator's sister during her natural life, and after her death, to Rachel Yates Boyles, the widow of his nephew, Thomas D. Boyles, and finally directs that when the trust shall cease -

""" thereupon my said Trustee is directed to pay, deliver and convey said trust fund, together with all accumulations thereon unexpended, share and share alike, to those corporations which are the legatees and devisees of my residuary estate as hereinafter provided; provided, however, that if all or a part of the legacies and bequests made is articles V and VI of this my will shall not have been paid in full, said fund shall first be applied to the payment of said legacies and bequests in the same

The last vill and tectment of Albert Mickinson, dea need, consists of two sritings: (1) his ordered vill, executed thereto, executed on Vetcher WV, 1985, taken contains five para-

in the ericinal will article I directs the payment of just debta, functed expenses and insend of all kinds. Article II makes openific bequests to the testator's wife. Article III dayless un interest in certain real estato to the testator's medean, Charles D. Leyles. Article IV makes a bequest to incyles under conditions which, we already stated, he elected hat to inifill, the centaing the same to lance. Moveral items, however, equest in this at it.

in Article V the testator gives modelie bequests to set all courses, nices and a mother; oreates a trust of \$50,000 with directions that the income shall yo to the testator's sister during nor matural life, and after her death, to Rochel Yates Seyles, the wites of his norther, Thomas D. Mayles, and finally directs that that the trust shall comes -

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manner as if this fund had constituted part of my general estate at the time of my death."

This article creates a further trust in favor of the son of the testator's nephew, Thomas D. Boyles.

Article VI provides:

"After the payment of the foregoing bequests, I give and bequeath to the following corporations, not for pacuniary profit, the sums of money set opposite their respective names, and upon

the respective terms and conditions following:

*1. To the Academy of Sciences, now located in Lincoln Bark in the city of Chicago, in the State of Illinois, the sum of One Sundred and Fifty Thousand Dollars (\$150,000). This bequest to said Academy of Sciences is given upon the tructs following: That the Board of Trustees of said Academy shall, with the proceeds thereof, build an appropriate building for the work and purposes of said Academy, to be known as Dickinson Hall, in which building there shall be among other things, an audience room which may be used for lectures upon food sumplies and the values of foods, and such other subjects as may from time to time be deemed beneficial to the public. If there shall remain in the hands of said Board of Trustees any money after each building hereinabove referred to shall have been paid for, said Board of Trustees shall have the right to use said remaining money, principal and income, for the purposes of the Academy, in such manner absolutely as to said Board of Trustees may seem wise.

"2. To the Chicago Mistorical Society, a corporation of the State of Illinois, the sum of Sixty Thousand Dollars (\$60,000) and I direct that the Board of Trustees of said Society shall have the right to use the principal and income thereof for the purposes of the Society, in such manner absolutely as to them

may seem wise.

"3. To the Clenwood kanual Training School, a corporation of the State of Illinois, the sum of Firty Thousand Dollars (\$50,000). I direct that the Board of Frasters of said school shall have the right to use the principal and income thereof for the purposes of the Johnst, in such manner absolutely as to said Board of Trusters may seem wise; but if eaid School shall not have an adequate symmasium or drill hall at the date of the above legacy to it. I shall be glad if this bequest to said School is used towards the payment of the cost of erection of such symmasium or drill hall.

"4. To the Allendale Association, a corporation of the State of Illinois, located at Lake Villa, Illinois, the num of

Fifty Thousand Dollars (\$50,000).

This bequest to the Allendale Association is given upon the trusts following: that the board of Trustees of said Association shall, with the proceeds thereof, build a cottage or other appropriate building for the work and purposes of said Association, which building I request shall bear the name of my brother-in-law, Charles C. Boyles, in appreciation of his interest in the work of the Association. If there shall remain in the hands of said Board of Trustees any money after said building hereinsheve referred to shall have been paid for, said Board of Trustees shall have the right to use said remaining money, principal and income, for the purposes of the Association, in such manner absolutely as to the said Board of Trustees may seem wise.

[&]quot;5. To the Library Association of Grange City, of Grange

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"S. Th the nithray installed of front Oldy, of Orange

City, in the state of Florida, the sum of You Thousand Bollars

(\$10,000).

"I direct that said bequest to said Association shall be by the leard of Trustees of said Association kept forever separate and intact, and invested in safe interest-bearing securities and the income therefrem forever used for the support and maintenance of said Association and for the prosecution of the work for which it is incorporated.

"6. (a) To the Chicago Lying-In Mospital and Dispensary, a corporation of the State of Illinois, the sum of fifty Thousand Dollars (\$50,500) upon the distinct condition that its Board of Directors shall have the right to use the principal and income thereof for the purposes of the Mospital, in such manner abse-

lutely as to said Board of Directors may seem wise.

(b) To the Chicago Lying-In Mospital and Dispensery, corporation of the State of Illinois, the further sum of Fifty Thousand Dollars (350,000), I direct that said last named bequest shall be forever known as the 'Bama Benham Dickinson Fund, and shall be kept forever separate and intact, and held and managed in perpetuity by the said Chicago Lying-In Mospital and Discensary, and that the income therefro, shall be used and applied for the uses and purposes of said Hospital, in such manner and form as to its Directors shall seem best.

To the United Charities of Chicago, a corporation of the State of Illinois, the sum of Twenty-five Thousand Dollars (\$25,000) for the exclusive use of the Legal Aid Bureau of said corporation, in memory of my friend Audolph asts, a former President of Said Society.

I direct that said bequest to the United Charities of Chicago for the use of said Legal Aid Bureau shall be by the Board of Directors of said corporation kept forever separate and intact, and invested in safe, interest-bearing securities, and the income therefrom forever used for the support and maintenance of said Legal Aid Bureau and the prosecution of the work of said Bureau.

To the Visiting Eurse Association of Chicago, a corporation of the State of Illinois, the sum of Ten Thousand Dollars (\$10,000) to be by the Directors of said corporation kept forever separate and intact and invested in safe, interestbearing securities, and the income therefrom to be forever used for the support and maintenance of said Association, and the prosecution of the work for which it is incorporated."

Article VII devises the residue and remainder of the astate. Article VIII names the nephew Boyles trustee under the provisions of Article V and gives directions as to the administration of the estate. Article IX names Boyles executor and provides, after granting powers to manage, sell, lease, convey, etc., -

"I desire that the bequeste in this Will contained shall be paid as soon as possible; but in order that my estate may not be sacrificed, I direct that my Executor shall have the period of five (5) years from and after my decease within which to administer my Estate and to pay the bequests in this will contained, if in his judgment it is for the best interests of my actate and of the Legatees hereunder that my estate remain open for said period or any part thereof."

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as odon an josetible; but in order that my electe may not be

i. "

The codicil by the first paragraph appoints Charles S. Quinlan and Leon L. Lochr co-trustees with Charles D. Boyles and makes previsions in case of a vacancy among the trustees. The second paragraph states:

"In addition to the specific bequests in Article V of my will, I give to Rachel Yates Boyles the sum of Ten Thousand Bollars (\$10,000)."

The third paragraph is as follows:

"In view of the fact that there may be no ready market for the sale of some of the assets of my estate I direct that my property after the dispositions made in Article I, II and III of my will shall be paid to my Trustees and that they shall set up the trusts and pay all the legacies without interest which are mentioned is my Will and in this Codicil, and my said Trustees may delay the payment of such legacies in order to fully realize upon my estate or for any other reason in their discretion; but said legacies shall be paid as rapidly as possible in the order in which they are named and all of them shall be paid within ten (10) years after my death."

Faragraph 4 gives to the trustees power to manage, sell, lease, etc., and directs that they may employ any one of their own number as agent or attorney at law or in fact, while paragraph 5 appoints Charles 5. quinlan executor with all powers specified in the will instead of Charles 5. Moyles and directs that he be not required to furnish any surety on his bond as such executor.

The decree finds that all the bequests and devisees contained in Articles II and V of the will have been fully set up in the hands of the trustees, and these payments are by the decree approved and confirmed. The decree further finds:

"It was the intention of the testator that in the event the assets of his estate should prove to be insufficient to pay in full all of the legacies contained in Article VI of his will, the legacies contained in said Article VI should abate proportionately. The following previsions in paragraph 3 of his codicil viz.: 'but said legacies shall be paid as rapidly as possible in the order in which they are named and all of them shall be paid within ten (10) years after my death'-- was intended by the testator as administrative only and does not indicate that he anticipated any lack of funds to pay all the charitable legacies in full."

The decree adjudges that the property found to constitute the trust fund described in Article IV is now a part of the CATALOG AND LABOR IN SMALL CONTRACTOR WITH THIS TO SECTION AND MARKET AND MARKET AND ADDRESS AND MARKET AND THE TRACTORS AND MARKET ADDRESS AND ADDRES

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The dearest adjudges that the property found to constl-

to the trust find described in Article IV is now a part of the

general estate of Albert Dickinson and that when cold the proceeds shall be applied, subject to rights of Charles Dickinson, together with other assets remaining in the general estate, to the payment of the legacies contained in Article VI of the will and all the rest, residue and remainder thereof in equal shares to the beneficiaries named in Article VII of the will, and that "in the event the assets of the estate of Albert Dickinson shall prove to be insufficient to pay in full all of the legacies contained in Article VI of his will, the legacies contained in said Article VI shall abate proportionately."

The Chicago Historical Society complains of this decree in two respects. The bequest of \$60,000 to it is second in the order named under Article VI of the will, and it is preceded only by a legacy of \$150,000 to the Chicago Academy of Sciences and is followed by legacies to six other corporations. The aggregate amount of all the legacies in Article VI is \$455,000. The aggregate of the legacies named in order after that of the Historical Society amounts to \$245,000. The Society contends that it was the intention of the testator to create a preference over these latter legacies in favor of the Society and that the decree is erroneous in previding otherwise. It also contends that if the court preperly construed the will in this respect, it then erred in helding that the legacies named under Article V of the will were entitled to priority and in approving the payments thereof made by the administrator.

The circumstances under which the codicil was executed appear in the record and were described with some degree of full-ness in the opinion filed upon the fermer appeal. These circumstances were testified to in detail by the atterney for albert Dickinson, who drew the codicil to the will and who was his trusted legal adviser and well informed as to the general conditions of

inall he applied, subject to rights of Charles Dickinson, together with other essets reveining in the gusoral catales, to the papernt of the legacies contained in Article VI of the will and All the viol.

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his estate and the various corporations which Albert Dickinson controlled. As on the former appeal, so here, the briefs of the parties argue many inferences favorable to their respective theories from facts and circumstances, a few of which it may be well to briefly set forth in order that the issues may be decided from the viewpoint of the testator's "arm-chair." The will in question was executed on June 29, 1936, the codicil on October 27, 1923. Albert Dickinson died April 5, 1925. He lacked one day of being 82 years of age. It appears from the testimony of his atterney that just before the execution of the codicil he had under consideration the execution of a new will and that a draft of such a will had been prepared. The attorney says:

"I told Albert that his available assets were probably not great enough, or might not be great enough to pay all the legacies in his original will, and that was one of the matters I had in mind when I prepared this new draft of will. *** Albert then took my draft of the will misself and sat down in a chair near the window and spent a long time looking at it. When he got through reading it he shook his head and said, 'I don't understand. " ask I talked with Albert further about this will and he kept saying only one thing definitely that he wanted changed, and that was, he did not want hr. boyles as executor. I had previously talked with him about the size of his estate and I asked him whether he realized that situation and -- after he finished the will he said he did. I am now referring to this draft. I had not yet prepared the codicil. He said he understood about the fact he might not have enough money to reach all the legacies. That, and the fact he did not want ar. Boyles as executor were the only two things which he stated definitely to me about the whole will. He discussed his charities, gifts to charity, and said he could not remember distinctly between the different charities and what they were. He said he recalled a few of them, but when he attempted to tell me what they were he became uncertain and said, 'I don't remember.' I therefore asked him whether he would like to have me abandon the draft of the will and prepare a codicil and he said he would. I then prepared a codicil embodying in it the only two features which he had clearly expressed himself about, and that was executed. ** "

The gross estate of the testator, as shown by the stipulation of facts, was \$1,756,894.06. The legacies given by the will, exclusive of the specific legacies and exclusive of the life estate for Charles D: Boyles, amount to \$910,000. After payment of the debts, cost of administration and inheritance taxes, aggregating estate and the various servorations which Albert Dickinson controlled. As on the former appeal, so here, the hrists of the parties argue many inferences inverties to their respective cheeries from facts and circumstances, a few of skick it may be well to briefly set forth in order that the insues may be decided from the viewpoint of the testator's "arm-chair." The vill in 1922. Albert Dickinson sind that hard is, 1935. He locked one day of being 62 years of age. It sepants from the testimony of bis at-being that just before the execution of an aw will am that the had under consideration the execution of a new will am that the had under consideration the execution of a new will am that the had under

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\$123,243.35, there remained at the time of the testator's death available for the payment of legacies property of the value of \$1.633.650.71. These figures are based upon the appraisal made for the purpose of determining the federal estate tax. The finding of the decree is that between the date of the will and the date of the decedent's death there were no substantial changes in the assets that he owned except (1) a conveyance of the real estate specifically devised in Article III, and (2) the creation of a trust fund amounting to about \$35,000 for the benefit of Louise and Ruth Dickinson. More than a million dollars of the value of the estate as placed upon it by the executors for federal estate tax purposes, consists of stock in the Albert Dickinson Company and other allied cospanies. Of this amount only \$77,250 has been thus far realized by sale of a small block of the stock. Without this stock, all the bequests except the charitable bequests given by Article VI have been paid, and the executors still have on hand in addition to the stock of the Albert Dickinson Company assets of about \$156,000. The Albert Dickinson Company and its allied concerns incurred heavy losses for the years 1920 and 1921, but they made a profit for the year 1922 of \$104,551.55. For the year 1923 there was a loss of \$22,550.54.

The administrator joins with the Chicago Historical Society in urging that the court erred in construing the will as directing that in case of deficiency the legacies provided for in Article VI should abute pro rata, but he maintains that the decree was right in approving the payment of the legacies as already made and asks that it be affirmed in that respect. The parties to this cause have called our attention to a number of cases which it is claimed sustain their respective contentions, but as in most cases of this kind the facts of each particular case are so unlike those of any other that authorities are of little use except as they

Nee staint the description for with the dulonge Historical Society in arging the the court errod in construing the will as directing that in own of solicioney the legacies provided for in the court in the legacies an already made was right in moreoving the payment of the legacies an already made and aske that it be affirmed in that respect. The parties to this cours have called the struction to a number of cones which it is of this kind the facts of some particular own are so unlike these of any other that authorities are of little use except as they

announce the well known general rules which must be followed in the construction of wills. The primary purpose of all construction, of course, is to determine what was the actual intention of the testator, and this should be determined by considering the whole will and giving proper consideration to each and every part of it and, if at all possible, by harmonizing the same. If possible, each clause and sentence should be given some meaning and no provision rejected if it can be construed so that it will stand. The intention of the testator must, however, be determined finally from the language of the writing itself. While oral evidence is admissible for the purpose of showing the circumstances and conditions under which the testator executed his will, such evidence may not properly be used to vary the terms which the writing expresses. The intention of the testator must be found within the "four corners" of the writing.

In the first place, we entertain no doubt that the decree properly approved of the payment of the legacies and creation of the trusts provided for in the articles of the will nreceding Article VI. That article, it will be noticed, begins with this phrase, "After the payment of the foregoing bequests, I give and bequeath," etc., immediately following which are the names of eight corporations to which bequests are made by the provisions of Article VI. That clause construed with the language which precedes it indicates the intention of the testator that the various corporations named in Article VI should not take anything until and after the payment of the prior bequests. The bequests named in Article V are all specific and are made to relatives who would naturally be the recepients of the testator's gifts and bounty. The gifts and bequests which follow are made upon the condition that these prior legacies shall first be paid, and the executor has rightly interpreted the will and carried out the intention of the

In the First place, we embertain no doubt that the -core the coloured old the margant all to covered tracers each eta of the truck provided for the articles of the will prosading Article VI. Fout tevicle, it will be noticed; begins with wig T , although halfment and in memora and terms, section alone eight corporations to viston bequests and made by the previsions of article VI. That cleans construct with the language witch proceeds -rop and and all this related the teather that and get and int if has littus uniderno odos ina bloque IV niolità al hanna emplicaco after the payment of the brise bequete. The bequests newed in Mison ode novisalou of sham our ham affiles of the tra V statour maturally be the receptants of the terrator's gifts and bounty. The fifte and bequeen white the walle's make appropriate the title of their value of the paint of the rest to notine out two between the all terrestate although

testator by paying them. Rexford v. Bacon. 195 Ill. 70; Abbeal of Pennsylvania Co. in Waln's Estate, 109 Pa. 479; Gwynn's Estate, 204 N. Y. S. 33.

Chicago Mistorical Society argues first that at the time the criginal will was drawn the testator had in mind a possible deficiency of assets to pay the legacies in full provided for in Article V and VI, and therefore added the provision:

"*** provided, however, that if all or a part of the legacies and bequests made in Articles V and VI of this my will shall not have been paid in full, said fund shall first be applied to the payment of said legacies and bequests in the same manner as if this fund had constituted part of my general estate at the time of my death."

It is pointed out that an identical provision was included in Article IV. We cannot regard this provision as requiring that construction. Articles IV and V both provide for the creation of certain trusts and then direct that at the time of the termination of the trusts the principal should be first used to pay any legacies not theretofore paid in full before the balance is conveyed to the devisees of the residuary estate. So inference can be drawn from these provisions that the testator contemplated any deficiency of assets to meet all the legacies provided for.

It is further contended that the provision in the codicil to the effect that the legacies named shall be paid as rapidly as possible "in the order in which they are named" also indicates that the testator had in mind a possible deficiency of assets, but any such construction can be adopted only by wholly disregarding the clause ismediately following in the same sentence which provides, "And all of them shall be paid within ten (10) years after my death." The original will provided that the executor should have a period of five years in which to administer the estate and to pay the bequests, while the codicil in almost identical language provides that that period shall be extended to ten years

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Sefficiency of seacts to meet all the logacies provided for.

It is increase contents named shall be paid as codicil to the effect that the logaries named shall be paid as rapidly as possible "in the order in which they are named" also indicates that the testester had in mind a possible deficiency of assets, but my such construction can be adopted only by wholly disregarding the clause invadintely following in the same sentence which provides, "And all of then chall be paid within ten (10) years after my docth." The criginal will provided that the executor should have a period of five years in which to administer the extent and to pay the bequests, while the codicil in almost identical language prevides that mint end chall be extended to ten repre-

after the death of the testator. It does not indicate, in our opinion, a possible deficit at the end of ten years, because it provides that all the legacies shall be paid by that time. The general rules applicable to a situation of this kind have been passed on in numerous cases, and the distinction between a provision in a will which merely directs a certain order of payment and one which creates a priority and preference as to actual rights and interest under the will is clear and fundamental. The onus lies on the party seeking priority, to show that such priority was intended by the testator. In Williams on Executors, 7th Amer. ed. vol. 2, p. 674, it is stated: "The proof of this must be clear and conclusive." The reason for the rule is that the testator in the absence of proof to the contrary is deemed to have supposed that his estate would be sufficient to answer the purposes to which he has devoted it. Jarman on Wills, 6th ed., vol. 2, p. 2087. is to the same effect, and the author says:

"As a general rule, legacies are payable pari passu, in whatever order they appear in the will; and no legacy has priority unless a clear intention appears. It is immaterial that the legacies are made payable at different dates or periods, or are given in succession, some being payable 'in the first place' or 'in the next place,' and others 'afterwards.'

In Titue' Administrator v. Titue, 26 N. J. Rq. 111, there was a provision in the will that certain legacies should be paid "in the order in which they are stated, and out of the first moneys that shall come into his (the executor's) hands, after paying my debts and funeral expenses." The court said that the testator clearly did not contemplate a deficiency of assets to pay all of the legacies in full, because he expressly bequeathed the residue not therein disposed of; that the provision was intended merely to secure as speedy payment of the legacies as practicable; that it was designed to secure the order of payment but it was with the manifest expectation that there would be enough to pay all and to

arear the death of the toutains. It does not indicate, in our orinion, a meanible deficit at the out of non years, because it south and the ad the selection and the that the tent of general rules applicable to a struction of this hind have been and on in newsrous cases, and the distinction between a provibun juonena to repto pintros a scouto vioren delme ille a na mois me added status as an expersion the trivial a correct as in all we are interest ander the will in cicer and idedmental. The ones lies and age privates done had work at an investigations after any or tended by the testator, in Williams on Provider, Volumer, of The state of the sale of the s and conclusive." The reason for the sule is since the testoter in becomes event of homes at yesters of tong la concede out of securing old revenue of fundalities of hiver scholar and failt whilsh he has dougted it. Jaruse on Wills, son ed., vol. 2, p. 2037. ta to the case of the the the series and of al

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was designed to assure the cries of payment but it was vish the

spare. The court further said: "By it the testator intended merely a priority of administration, or in the realization and amplication of assets." This case comes pretty near to being on all fours with the case which must be decided here. In Lord Dunboyne v. Brander, 18 Beav. 313, 52 Eng. Rep .-- Full Reprint 123, a testator gave certain legacies and directed that they "should be invested in the order and become payable and paid in the manner therein mentioned." The assets were found to be insufficient, and it was contended that the legatees first mentioned should be preferred. but the master of the rolls. Sir John Romilly, pointed out the distinction between what he called "getting in and realization of the assets, and the giving a priority of rights and interests." and held that the whole scope of the will shoved that there was no anticipation of any deficiency of assets and that there was no priority except ag/the administration of the same. The basis of the rule is the equitable maxim that equity is equality and that in the absence of a clear intention to the contrary that maxim will be applied. As some of the cases say, a doubt dofeats the priority. To the same effect is Miller v. Muddlestone. 3 Mac. & G. 513; 42 Eng. Reports. Full Reprint 123. So also in Towle v. Swasey, 106 Eass. 100, the court said that the testator in the absence of clear proof to the contrary must be deemed to have acted on the belief that the estate would be sufficient to answer the purposes to which he devoted it. and that men do not ordinarily go through the formality of making wills and disposing of property which they do not own or do not reasonably Rope to become possessed of. The court also said:

"As between the logacies which are in their nature mere bounties, the presumption of intended equality will prevail, unless there is unequivocal evidence to the centrary; and no priority will be allowed where the expressions of the will are ambiguous. Shepard v. Guernsey, 9 Paige 357. 2 Williams on Executors 1233. Thwaites v. Forman, 1 Collyer 409."

See also Porter v. Howe, 173 Mass. 521, 54 N. E. 255; Swasey v.

Aftern interest motiver and hi will their bestraft from off, orders softenity of administration, or in the resistant on a priority of manotes." This onse course protes near to being on all fours when the past of the load to meet he had been as the last many and drive Brander, 18 Mear. 213, 85 Mag. Jone .- Itll Magrine 125, a tertainer of merapes of bloods your tail beforell lie witness thereor own maps alored towns out at him but all alored has where all tioned." The sacets were found to be launt light, and it was . Perrota vg of Signal Designate Public bestigned and yadd better from and two has nion . william Hamb The . willow wit to Totale and Just to noticultary but at guiding" builts and Salv mounted noticalibile the issuets, and the giving a priority of rights and interests," and altus on our orest Juny Sevenu Illy eds to egoes eledy odd failt blod estroire on any sand sand fou estress to your tolish you to notheries st afur sit the atmistate of the cone of the the this the this the this noused out at that box wilkers it without Jed minus blankers off to clear interprise to the contrary that mark will be applied. some of the dance any, a doubt dariont when priority. To the came . From K . The Late of the contract of the con Pail Reprile 135. by also in Paris y, Prayer, low Lass, 100, was not not know would be assemble all all periodical and facility being recomorates self tand letted out to heave eved of bemost of them was inco . It betavek od deldw at assering add watman of im leftles of bloom and that he de det endiently so through the forestity of making Sou of the awa for of your dolde givener to massegelt has allie the rate rate from all. To berested about at some philosophers

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nes time Parties v. Bear, NY house, NY, Se S. S. 1001 Present vo.

American Bible Society, 57 Me. 523.

Looking at the provision of the codicil from the standpoint most favorable to the contention of the Chicago Mistorical Society, it must be said that the provision does no more than create an ambiguity or doubt, and that for that reason the contention must fail. It is true that the affairs of the testator were somewhat complicated, but the condition of his estate, as we have already pointed out, was such that he might well have believed that a very large amount of money would be received by the Young Men'a Christian Association of Chicago and the Old People's Home of Chicagol who were made his residuary legatees under trusts which were created of such kind and nature as must be held to show clearly his expectation that all prior legacies would be paid in full. There is this further observation, which is not without great weight. The will and the codicil were both drawn by lawyers of experience and ability, and the language appearing in both is such language as lawyers use. This is not the case of an unlearned or ignorant person failing to fully express an intention in a document carelessly drawn. We find it impossible to believe that justing as the testator was under the immediate advice and direction of his counsel) if there had been any real anticipation of a possible deficit, the provision with reference thereto would have been made in doubtful or ambiguous language. It is impossible to determine that there was an intention to give priority as between these legatees. Any construction finding an intention to give such priority would be based on mere conjecture.

The attorney who draw the codicil says that when he discussed with the testator the question of the charities named in the will, the testator said "he could not remember distinctly between the different charities and what they were." Assuming this to be the actual situation, it is difficult to understand how it

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on mere conjecture.

these set more finishes out to notalyour out to polifical point meet favorable to the contention of the dulong Historian Suciety, it must be said that the provision does so more than season was emiliarly of facility and that les that became the courses. tion many fail. It is true that the affairs of the testator were somewhat complicated, but the condition of his establing by sads beyelfed own filew state as the nath love as the heartes there and wary large emount of squey would be received by the Toung Man's by head a value of him and how reported by antenderent settled with Moldy nigury tolan accomment your last and chan crow ode lease to vizzois were of hisd of laum or sandam ham half some to bedrees agov his expectation that all prior legacies would be paid in this : There in this Parton concernation, which is not williard great weight, 1904 will and the codicil were both drum by lawyers of enperience and . ability, and the language appearing in bette in such language as lawyers use. This is not the same of our surrection of the large and year Pleasioned formula a ai notice that we seemen that of maille? drams. We find it impossible to believe that (noting as the testes If (Leanupe sin to universit has selves the board out token our tot -ore and . Similar addison a lo mijugloidum fact you mood had eveni to follow at about mest avoit there of small senoto ter till moisty ambiguous language. It to impensible to determine that thurs was on intention to give priority as between theme legates, Any conheard of bluow vitality dose and on maintain as partail welfburts

The sticency who down the confell mays then when he discussed in discussed the vill, the costates and "be could not recenter distinctly new two the different charities and what they were." Assuming this to be the actual charities to difficult to understand how it

could have been the intention of the testator in the execution of the codicil to create any right of priority as between this class of legatees or to prefer any one of them to the exclusion of another.

Moreover, an examination of the whole will including the codicil discloses that the legatees are classified with great care and that each class is put in a group by itself under one of the articles enumerated. The language which the testator uses indicates that he thought of these legacies not as individual items but as groups. When, therefore, in the codicil the testator directs that the legacies should be paid in the order in which they are named, it seems most reasonable to suppose that he referred to the group order rather than to the order in which the different items of the particular group are named.

For the reasons indicated the decree is affirmed.

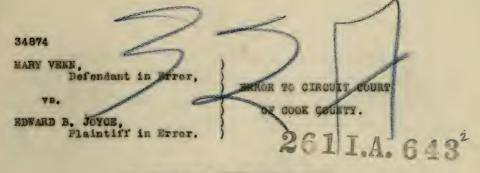
O'Connor and McSurely, JJ., concur.

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MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This writ of error demands a review of the record which discloses that on June 22, 1929, default of the defendant for failure to appear was taken, and upon hearing by the court a judgment was entered in favor of Theodore A. Venn, administrator of the estate of Mary Venn, and against defendant in the sum of \$10,000.

There is no bill of exceptions. The record shows that on September 15, 1926, a praccipe was filed with the clerk of the Circuit court, directing him to issue a summons to Edward B. Joyce, defendant, in a plea of trespass on the case to the damage of Mary Venn, the original plaintiff, returnable to the November term, 1926, and demanding damages in the sum of \$15,000. Alias and pluries summonses were issued at the suit of plaintiff, and September 26, 1927, another pluries summone was issued and returned as served on defendant on September 27, 1927. On Bovember 9, 1927, a declaration was filed disclosing an action for negligence, whereby plaintiff was injured July 4, 1926, through the collision of two motor vehicles. December 10, 1927, the attorney for plaintiff suggested the death of kary Vons., and it was ordered that the cause proceed in the name of her administrator. Theodore A. Venn. The order found also that due personal service of summons had been had on defendant at least ten days before the first day of the term; that he did not appear; that his default should be taken and entered of record. February 16, 1926, the

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There is no bill of exceptions. The record shows that on September 18, 1926, a pracelne can riled with the clerk of the Circuit court, directing him to issue a numena to Edward E. Joyce, derendant, in a clea of treasure on the case to the damage of Mary Venn, the original plaintiff, returnish to the hoverbor torm, 1926, and domanding damages is the sum of \$15,000. Altas . has . This had to size out in heart orow accrement whireig has September 28, 1987, sucher pluries summers was issued and returned as served on defendent on destacker 27, 1927. On Movember 9. 1937, a declaration was filed disclosing an notice for nealgenes, whereby plaintlif was injured fully 4, 1936, through the collision of two noter vaidales. December 10, 1927, the atterney for plaintiff suggested the death of hary Venn, and it was ordered ercheeff . Todardaintaka red to omes and al become access out Judi To seivres leavered out this of in biro off . mev . I eds exoled agab and issel is inches lab no bud and bad and man similab and sade thouse sea his ad this twent cut to yet terit should be taken and satured of record. February 16, 1928, the

record recites that the cause was called for trial, and that plaintiff failing to prosecute her suit it was ordered that it be dismissed at her costs for want of prosecution; that she take nothing by her action, and that defendant recover costs from plaintiff.

On September 28th thereafter the record shows that an affidavit of Irving E. Reed was filed in the office of the clerk of the court. It is not preserved by bill of exceptions but purports to state facts as follows: That the affiant is the attorney of record for plaintiff; that on December 10, 1927, an order was entered giving leave to said attorney to amend the pleadings on their face, to substitute Theodore H. Venn as plaintiff and administrator for Mary Venn, the deceased plaintiff and defaulting defendant, for want of an appearance; that on February 16, 1928, affiant appeared before Judge Arnold when said cause was on the trial call and asked the court to put the cause on the past case calendar for the reason that affiant had not been able to get all of his witnesses together and bring them into court to prove up plaintiff's damages and for the further reason that Theodore M. Venn, deceased's husband, was suffering a severe shock on account of her death and was on the verge of a nervous breakdown and in no condition to come to court to testify; that said court thereupon ordered said cause to be put on the past case calendar; that when the new fall common law calendars were issued in September, 1928, he looked for said cause on the past case calendar and upon being unable to find it, he checked the court orders and files and found for the first time that the suit had been dismissed February 16, 1928, at plaintiff's costs.

The affidavit further states that plaintiff administrator has a good and meritorious cause of action against defendant, as alleged in the declaration theretofore filed, which was made a part of the affidavit; that said court was without jurisdiction to enter record recites that the counc was culted for trial, and that to be classed that it be selected that it is be classed at her corts for want of prosecution; that the take take to be a consecution; that the take take to be consecution;

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the order of Pebruary 16, 1928, providing for the dismissal of said suit at plaintiff's costs for the reason that there had been a previous order entered on December 16, 1927, defaulting defendant for want of appearance.

On the same day a motion was filed by said attorney to vacate the order of dismissal entered February 16, 1928, "for the reason that said court had no jurisdiction to enter said order, and it was therefore void."

June 22, 1939. Theodore M. Venn, the administrator of estate of plaintiff, filed an amended declaration in a single count in which he alleged the collision of a motor vehicle in which hary Vonn, deceased plaintiff, was riding, with a motor vehicle driven by defendant; that deceased was in the exercise of due care; that defendant failed to exercise due care "in that he operated said motor vehicle in such a wilful, wanten, dangerous, unlawful and reckless manner, with knowledge of the presence of deceased, and with the intention of causing an injury to her, and in total disregard of her rights and the rights of others, who were lawfully upon the said street." and as a consequence thereof the vehicles collided, by reason of which the deceased received injuries from which she died on July 9, 1927. The declaration alleged the appointment of an administrator and that deceased left surviving her certain heirs at law and next of kin who had sustained pocuniary damage by reason of her death.

The record recites that on June 22, 1929, upon metion of the administrator's attorney for a hearing to submit proof of damages sustained by the administrator, the court found that defendant was duly served with summons on September 27, 1927; that plaintiff's declaration was duly filed thereafter on hovember 9.

1927; that defendant was defaulted on December 10, 1927; and ordered that leave be thereby given claintiff's atterney to withdraw three

the order of Johrnany 16, 1975, providing for the Simplessier on are nuit at plaintiff's conta for the reason that there had been a are-

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counts of his declaration and to exend the fourth count by filing an amended declaration instanter; that the administrator valved a trial by jury and submitted evidence to the court in proof of danages. The court also found that the administrator had suffered and sustained damages as alleged in his declaration and awarded the same to the administrator and against defendant in the sam of \$10,000, for which judgment was entered.

The centrolling question in the case arises out of the contention of defendant that the court was wholly without jurisdiction to enter the order of September 28, 1928, setting saide the previous order of February 16, 1928, by which the cause of action was dismissed and judgment for costs entered against plaintiff. Defendant rests his contention upon the rule first announced in Cook v. Wood, 24 Ill. 295, which has ever since been consistently folloved by the courts of this state to the effect that after the expiration of the term at which the final judgment or decree is entered, the court is wholly without jurisdiction to vacate its orders entered at the previous term except by a written motion in the nature of the common law writ of ceram nobis in compliance with the procedure provided for in section 89 of the Practice act. Smith-Hurd's Ill. Rev. Stats. 1929, chap. 116, sec. 99. A few of the cases in addition to Cook v. Wood, above cited, which sustain this proposition are Billboard Publishing Co. v. McGarshan, 180 Ill. App. 539; Barnes v. Chicago City Ry. Co., 185 Ill. App. 148; Katauski v. Eldridge Coal Co., 255 Ill. App. 41.

The administrator argues, however, that defendant is in no position to question the order of September 28, 1928, reinstating the cause because no bill of exceptions was preserved, and cites a number of cases, such as <u>Hickman v. Ritchey</u>, 252 III. App. 560, and <u>Feeple v. Levin</u>, 318 III. 227, holding that such an affidavit is no part of the common law record and that it must be in-

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corporated in a bill of exceptions in order to be preserved.

The absence of a bill of exceptions does not avail the administrator under the facts disclosed by this record. The record shows that the court at the end of the term at which the order of dismissal was entered lost jurisdicties, and as was said in <u>Morgan</u> y. Campbell, 54 Ill. App. 242:

"Jurisdiction having been once lost, and the term passed, the record must show that it was regained, and how, or the judgment has no basis. In Sweeney v. The People, 28 Ill. 208, it is said that 'on a writ of error, the party, to retain his judgment, must show a good record.' In Miller v. Ulass, 14 Ill. App. 177, that rule was applied to a case, which being remanded by this court to the Superior court of Cook county, was there discosed of, and the record did not show that the party against whom the judgment went, had been notified that the remanding order had been filed."

The opinion quotes with approval from Hettrick v. Wilson, 12 Ohio St. 136, where the court said:

"It has been suggested that where the record is silent on the subject, we must presume that the defendant below was regularly in court. But we cannot so hold in tais case. For, however we might presume in favor of the validity of a judgment, where the parties are shown to have been before the court, and where they could, therefore, have made the error complained of appear affirmatively by exception or otherwise, yet no such presumption can be admitted to prevent the direct impeachment of a judgment, where the subject of the complaint is that the party has had no day in court, and so had no opportunity of placing anything upon the record."

In Brady v. Washington Ins. Co., 67 Ill. App. 159, it

"On direct pleadings to review a judgment, the jurisdiction of the court over the person must appear by the record, or the judgment cannot be sustained."

Citing Law v. Grommes, 158 Ill. 492. To the same effect are Barnes v. Chicago City Ry. Co., 185 Ill. App. 148, and Harris v. Chicago House Wreaking Co., 314 Ill. 500.

If plaintiff is to prevail then it must be upon the theory that the order of reinstatement was entered on proceedings conforming to section 89 of the Practice act, which provides:

"The writ of error coran nobis is hereby abolished, and all errors in fact, committed in the proceedings of any court of

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record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. When the person entitled to make such motion shall be an infant, non compos mentis or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years."

under said section 89, it appears to be materially defective in two respects: (1) While the statute requires reasonable notice of the preceding, it does not appear that any notice at all was given; and (2) the affidavit newhere avers nor sets up facts tending to show that plaintiff was not negligent. While proceeding under sec. 39 is in some respects necessarily supplementary, the authorities all agree that it is in substance the beginning of a new suit; that the affidavit or petition takes the place of a declaration and that notice must be given to the opposite party. McGrath & Swanson Co. v. Chicago Nya. Co., 252 Ill. App. 476, cited and relied on by the administrator, is to this effect and declares that with respect to process, pleadings and judgments, the writ may be considered as a new and independent action, but it "is supplementary in its nature for the purpose of correcting errors committed in a preceding cause."

Plaintiff, however, says that the facts disclosed by the affidavit are sufficient to show diligence and cites Rosenthal v. Wald. 252 Ill. App. 365, where it was held that a judgment entered by default in the sumic pal court of Chicago against defendant when the case was reached for trial, due to a misprision of the clerk of the court in not putting the cause at the foot of the docket under a court order that the case be stricken from the short cause calendar and placed in its usual place on the jury calendar, should have been vacated on motion. That case does not discuss the matter of diligence. As a matter of fact, the petition does not disclose any degree of diligence on the part of the attorney for plaintiff to

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court order that the case he arriched from the short cause calendar
and placed in its ammal place on the jury enlander, chould have been
vacated on metion. That case does not discuss the catter of dilligence. As a matter of fact, the peribled does not disclose any
degree of diligence of the cast was discovered for placetiff to

ascertain after February 16, 1928, whether the order to place said cause on the past case calendar had been in fact entered.

Plaintiff contends, citing Mckurray v. Peakedy Coal Co. . 281 Ill. 216, that counsel had the right to rely on the announcement of the court to the same extent that he would rely on the rules of the court, and that it was not the duty of the attorney in the exercise of due diligence to ascertain either from the Law Bulletin or from the docket whether the clerk had entered the order as stated by the court. He further contends that there is no rule of statute or of court which prevides that parties or their attorneys are bound to take notice of notices published in the Law Bulletin. and refers to Schick v. Durban, 209 Ill. App. 266, where it acpeared that a party was misled by the publication in the Daily Municipal Court record of a statement to the effect that the cause was put upon the next jury calendar, while no such order was in fact made, and the court said that the party complaining was not justified in relying entirely on this publication. However, the affidavit here fails to show examination either of the haw Bulletin or of the docket of the court. Gburek v. Kuss, 255 Ill. App. 346: Coultry v. Yellow Cab Co., 252 Ill. App. 443; Lowe v. Krauspe, 320 Ill. 244, are cases where under facts quite similar to those appearing here it was held that the failure to discover the order which had been in fact entered amounted to negligence. However that may be, the proceedings are defective in that they fail to disclose that either reasonable notice as required by the statute or any kind of notice was in fact given to the opposite party.

Plaintiff further contends that the trial court was not without jurisdiction to enter final judgments against defendant and relies on rule 21 of the Circuit court of Cook county, which in part provides:

sion on to control of the state of the order to other seconds.

AND DESCRIPTION OF THE PROPERTY OF THE PROPERT 281 111. 218, that coursel had the ri ni a i in a share once out to truce of to troop we wounded not to who odd for new at that her , were add to network wad one more which mistroom as account the one to salary and Tebro said hereiss had dande end to the form the contract of as atated by the court. He further contends that there is no rule meanotic read we enline that nebivery moins trues to so sintel to are bound to take notice of notices published in the Law Rulletin, and refers to Schick v. Surkam, 200 131. App. 260, where it aswater a party was placed by our persons as a property of the Color ectes out deat too'the end of tementate a to proper true! Lacieland out at men the next tury calender, while and order out the made, and the court end that the purty complaints nur not fuct. fled in relying emtirely as this publication. However, the affito misciful wall out its resting metabolisms were of sligh over tived of the docket of the court. Ghares v. Augs. Ens 112. Asp. 346; Coultry w. Paller Dir. Inc., No. 112, Apr. 1811 Lots S. Criming, 200 Dir. 364, ore manes mines means from the challeng to Done aspearing here it was held that the fallure to discover the order which had been in flow metered amounted to negligenee. Hevever that may imis encountly at hish read tone an erison to enthecoors out . of elther remonshe motion as required by the statute or only kind of agree as the energy and of moving tout at mor outfor

Plaintiff further contends that the trial court was not without jurishout jurishing to enter that Judgments against defendant and relies on rule 91 of the Circuit court of Cook county, which in part relies on rule 91 of the Circuit court of Cook county, which in part

"Where a party is in default for want of appearance no notive shall be required, except upon order of the court. " In this connection plaintiff cites section 39 of the Practice act which provides for amendments either of form or substance in any process, pleading or proceeding on such terms as are just and reasonable at any time before final judgment in a civil suit, and he also cites a long line of cases which hold that where a defendant has been duly nummoned to court and does not enter his appearance, he is presumed in law to be constantly in court and is under the further presumption charged with notice that plaintiff by leave of court may make any amendment necessary to proceed with his cause of action. Bird-Sykes Co. v. McNamara, 252 Ill. App. 262; Nichoff v. The People, 171 Ill. 243; Ruppe v. Glos, 251 Ill. 80; Pease v. Rockford City Traction Co., 279 Ill. 513; Oberman v. Camden Fire Ins. Assoc., 314 Ill. 264, and many other cases are cited. Of course, all of this is in one sense immaterial, for if it be true, as we have held, that the court was without jurisdiction to set aside the order of February 16, 1928, which dismissed the action, then the jurisdiction acquired by the court through the nervice of its summons upon Joyce was ended and these presumptions would no longer exist as to him, but assuming the court had jurisdiction by reason of the affidavit submitted to reinstate the cause, it would not have jurisdiction without notice to defendant to permit the filing of a new declaration stating an entirely different cause of action from that defendant had been summoned to answer and to enter judgment thereon against defendant. Defendant is presumed to be present and to know what transpires in court with reference to the cause of action he was summoned to answer, but he is not presumed to know when summoned to answer at the suit of Mary Venn that he may also in his absence be called upon to answer in a statutory cause of action by the administrator of the estate of Mary Venn.

Where a . . is in definit for want of synearance ne me-. druos and to rabro moon toons, bertupar of floth soit In this conception midraly with seating 39 of the fraction and the of company to mist to entrie services will achieve a piece the stay of the market make or pathocourt is pathocal passenge has store this out transplant family wented well you do addenseen -harron a event that the deliveres to entrance a sette ente on ent has been duly successed to court and does not enter his assentance, he is procued in les to be constantly in court and is under the flow or exemption mayed with notice that called a layer name of the property of Arthurson Services for the same of the pass passes for Marking day at a sales and and an army blanch and nonline. The Jacobs, 191 231, 182; Layer v. Oles, But 111, Dog Cases T. seriors the menter the IV III. His Compact Content Vice los, seece, 314 bls. 814, wit my other comes ore exted. course, all of this to in one sense lundterial, for if it be true, des of moldskhelrut duest in ear truce out that his eval or ac aside the order of February ld, 1826, which dismissed the astion, is solven and amounts from all to Berliges solvethelyst and send its summons upon Joyes was outed and these presumptions would no er astroited but James and pales or too , and or to defer warmed bluow it, neums of otelenler of heritadus stratists out to nemer out times of turbing to be so the notice to defendant over the sauce installib glatifue on unlimbs anibraluch were to mailit of has reverse of heageness and had turbue tel faid mor't melfor te Day'endent is presumed to sation laborated bearings assumed business workers, be present and to know what transpires in court with reference to the course of action as was summend to ensure, but he is not protant may yuad to the only to newen of hencemes ned word of bemus to may also in his absence be called upon to answer in a statutory eause of action by the administrator of the estate of Mary Year.

It is quite unnecessary to point out the distinction between the original cause of action brought by Mary Venn and the cause of action upon which her administrator finally obtained a judgment. The distinction between the two causes of action has been pointed out in Carlin v. Peerless Gas Light Co., 283 Ill. 142; Martray v. Chicago Rys. Co., 290 Ill. 85; Bishop v. Chicago Rys. Co., 303 Ill. 275; Wilcox v. Bierd. 330 Ill. 571.

We hold in the first place that the court was without jurisdiction to reinstate the case after the expiration of the term at which it had been dismissed; that considering the affidavit for reinstatement of the case, from the viewpoint of the procedure of section 89 of the Practice act, the same was wholly insufficient, and that at any rate the order of the court permitting the filing of a declaration which stated on entirely different cause of action, defaulting the defendant thereon and entering judgment without notice, was erroneous.

For the reasons indicated the judgment is reversed and the cause remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

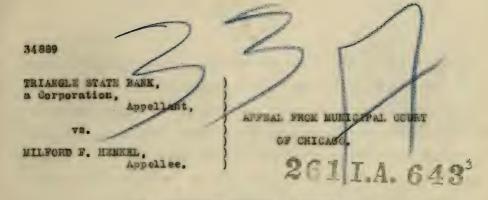
O'Connor and McSurely, JJ., concur.

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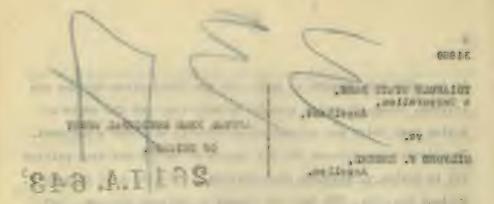


ER. PRESIDING JUSTICE MATCHETT DELIVERED THE OPICION OF THE COURT.

On February 6, 1936, plaintiff bank confessed a judgment in the sum of \$5098.70 against defendant upon two promissory notes. On motion of defendant supported by an affidavit the judgment was opened up, and it was ordered that the affidavit stand as an affidavit of merits. The cause was submitted to a jury, and at the close of all the evidence plaintiff moved for an instructed verdict in its favor, which was denied. The jury returned a verdict for defendant upon which the court, overruling motions for a new trial and in arrest, entered judgment.

It is contended by plaintiff that the court erred in refusing the instruction and that under the facts on the authority of Americae National Bank v. Woolard, 342 Ill. 148, the judgment should be reversed here with directions to enter an order confirming the original judgment by confession. An examination of the points made in the brief and of the arguments of the respective counsel discloses this to be the controlling question in the case and it will therefore not be necessary to discuss other alleged errors assigned and argued.

The affidavit of merits alleges that on April 23, 1927, through the cashier of the plaintiff bank, defendant entered into a transaction wherein it was represented to defendant by the agent of the plaintiff bank that if he would purchase thirty shares of the capital stock of the bank and execute his note for the same in the



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ment in the sum of \$2000. We against defendant upon to the motion. (a motion of defendant suspented by an affidavit the motion. (a motion of defendant suspented by an affidite the interest of all the evidence plaintiff moved for an family of the cips of all the evidence plaintiff moved for an action for a new trial and in arrest, entered judgment.

ounced the reverest to the description to the court error in the rest to the reverest in the rest of the reverest interestion to omter an order confirmable to describe and the reverest in the confirmation of the confirmation of the respective of the consective and it the the belief and of the consection that the consection the the consection and it will therefore not be necessary to discuss other alleged errors assisted and arguest.

The efficient of merits elleges that on Artil 23, 1927, through the camies of the plaintiff bank, defendant ontered into a transaction shorted it was represented to defendant by the mont of the the plaintiff bank that if he would purchase thirty shares of the capital stock of the bank and execute his note for the sums in the

sum of \$4171.50, payable six months after date, he would not be obliged to pay the note or accept the stock except at his own option and election; that plaintiff would redeliver to defendant his note or any notes given in renewal thereof, and that no liability of any kind would attach; that the reason for granting these exceptional terms was defendant's standing in the community and the desire that he might "lend prestige, dignity and standing to the plaintiff banking corporation." In fine, the affidavit states that the real agreement was an option to purchase stock at defendant's election rather than a contract to actually do so. It further states that "at no time would any effort be made to require the defendant to pay the said note and that the note was executed as aforecasid only for the purpose of keeping straight the records of the plaintiff in regard to this transaction."

As a further defense the affidavit avers:

"No certificates of stock of any kind or nature were ever delivered to defendant; he never received any dividends on said stock and he never received any notice of annual meetings of stockholders or meetings at any other time. Thereafter, relying upon the said promises and agreements of plaintiff, defendant did in fact execute certain notes and the renewal of said notes aforesaid, which said renewal notes are the ones upon which this suit is predicated **** that both of said notes were simply in renewal of said note of defendant first mentioned, together with interest thereon and were made *** upon its (plaintiff's) said representations and agreement."

In other words, the second defense which the affidevitt seeks to interpose is that there was lack of failure of consideration for the notes.

balf tending to show that at the time of the original transaction on April 23, 1927, at the Triangle State Bank, the real contract was one by which defendant took an option to purchase thirty shares of bank stock at his election, but all this evidence, upon objection by plaintiff, was excluded by the court upon the theory that it was not admissible as tending to establish a parol agreement

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In other words, the second defense which the affidavit:

described the original defendant elections tention in his behalf tender to meet that at the time of the original transaction
on the cost by which defendent took an aption to purchase thirty charca
of bank stock at his election, but all this cridence, upon objection by plaintiff, was excluded by the court upon the theory that
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not to pay the notes, which would vary the terms of the notes themsolves. Such is the well established rule to which plaintiff cites numerous authorities. Eager v. Mutchinson. 7 Ill. (2 Gil.) 266: Hiller v. Welle, 46 Ill. 46; Weaver, adar. v. Fries, 85 111. 356; Mypes v. Griffin, Admr., 89 Ill. 134; Westbrook v. Howell, 34 Ill. App. 571; Clinton v. Royal, 203 111. App. 248; Biblack v. Frank, 209 Ill. App. 162; Farmers State Bank & Trust Co. v. Parr, 234 Ill. App. 78; Testagrer v. Lordlund, 259 Ill. App. 247. The distinction between parel evidence tending to contradict the instrument itself and parol evidence tending to show that a written instrument was never in fact delivered, is pointed out in a number of cases cited in the briefs. Penny v. Graves, 12 Ill. 286; Foy v. Blockstone, 31 Ill. 538; Schultz v. Meyer, 181 Ill. App. 335; Heach v. Dennis. 194 Ill. App. 663; Mandley v. Drum, 257 Ill. App. 567. See also the note to Vincent v. Russell, 20 A. L. R. 421. Defendant does not undertake to distinguish these cases and does not assign any cross-errors upon the rulings of the court in excluding the offered evidence.

plete failure of consideration for the notes executed by him; that there was evidence sufficient to go to the jury upon that issue, and that the verdict of the jury should not be disturbed. In his argument, however, upon this point, defendant relies upon the facts appearing in evidence offered by him but excluded by the court, and in the absence of cross-errors he may not be permitted to do this. The affidavit of merits hardly discloses allegations sufficient to constitute the defense of failure of consideration. It alleges as facts that no certificates of stock of any kind or nature were ever delivered to defendant; that he never received any dividends off the stock, and that he never received any actice of the annual meetings of stockholders or other meetings at other times. Defendant gave

ast to pay the notes, which would wary the barms of the notes themsolves. Just le the well catellished rule to whileh plaintiff elter dress v. Calula, adam, and all market bearing the ball and . It's term agreement the state of the state set year | bell the control of the c Things needs you not not have not an instruct appealing long agency. saw discourt unit it a dail work of pullous comelive force has hotels some to reduce a middle of the trade of contract of in the brising . Smoot w. Smoot will find the v. Blackwich at Market of the continuence and the care this perch v. Danoin, 164 121. Ann. 2021 sort r. Tor., adv also and the also sech innheritation . Ille . A . i. . i. . i. . i. venter of ofon off on derica to distinguish these comes but does not casta nur bergits and initially di franc and a militar and past attransmissa AND DESCRIPTIONS

evidence tending to show these facts and also that the bank stock purchased by him did not stand in the name of the bank but in the name of a third person. The theory of the defense seems to be that the defense was established by proof that defendant did not receive the certificates of stock, notices of stockholders' meetings, dividends, etc.

The uncontradicted evidence above that at the time of the original transaction defendant signed a receipt form in blank in a stock transfer book; that the stock was transferred to his name on the books of the corporation, and that defendant gave his note for the surchase price of the stock and deposited the stock with the plaintiff bank as collateral to secure the payment of the note. The transfer of the stock upon the books of the bank and the exercise by defendant of the rights of a stockholder smounted to a transfer of the stock to him, although he did not receive the certificates. The delivery of the certificates was not essential to the transfer of the ownership of the stock. Chicago Title & Trust Co. v. Ward, 332 Ill. 126; Colton v. Williams, 65 Ill. App. 466; Allen v. Williams, 212 Ill. App. 114; 5 Thempson on Corporations. 3rd ed., sec. 3467, are a few of the many authorities which might be cited to this point. Moreover, since defendant delivered the stock to be held as collateral to his notes, he was clearly not entitled to the certificates nor could be raise the defense of lack or failure of consideration until the note was paid. Crowther v. Bell, 190 Ill. App. 48; Denzer v. McAvov, 224 Ill. App. 359. The mere proof therefore that defendant did not personally receive the certificates, that he did not receive dividends when, as a matter of fact, there is no proof that any dividends were declared, that he never received any notice of annual meetings of stockholders or of other meetings, comes far short of proving that there was a total failure of consideration or lack of consideration for the execution

evidence terring to show those rects and show that the bank stock purchased by him tid not etund in the purchased by him tid not the bank but in the second of the defendant did not remained that defendant did not remained in the defendant did not remained the second of steckhers' martings, divi-

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of the notes.

It should not be forgotten in this connection that the notes recited a consideration, and that in the absence of proof to the centrary, under the provisions of the Aegotiable Instrument law, consideration was presumed and that the burden of proof was upon defendant to establish a lack or failure of consideration. A consideration is presumed until the contrary is made to appear. It is true that upon examination of defendant after he had stated that he signed the note and the stock book, he was asked. "That did you receive for the note there, if anything?" and he replied without objection. "I did not receive anything." He was then asked. "Did you receive property of any kind or nature?" to which he replied. also without objection, that he did not. Inese statements are the more conclusions of the witness and avail nothing whatsoever since his evidence, as well as all the other evidence in the case as to the actual facts, shows he did receive the property in the stock: that he deposited it as collateral to his own note which has not been paid; that he exercised his rights as a stockholder by executing a proxy authorizing another to attend a meeting, and that the stock was actually transferred to him upon the books of the corporation. Similar replies made to somewhat similar questions by the defendant in American National Bank v. Woolard, 342 Ill. 148. were held by our Supreme court insufficient to justify a jury in reasonably finding in favor of a party holding the affirmative of an issue, and it was there held that a motion to direct a verdict against such party should have been allowed. In that case the Appollate court for the Fourth district reversed the judgment of the Circuit court and remembed the cause with directions to enter a judgment order confirming the original judgment by confession, and the Supreme court affirmed the jungment of the Appellate court.

For the same reason and following that precedent, the

PAGE AND THE COMM. AND THE RESTORAGE AND AND SERVICE P. torry be received and all raid him . RELATESTATION a Deliber parent and Paramography Albertages, soft to see to be try soft below, you throse edd of law, concident was provinced and that the burden of proof was agen definition to entablish a lack or failure of consideration. .TROOPS of them at Yarthee and With the U. and the Company of the C in a lar the new others, if the large of the lid . De de au la contract de contract de la la la la la contract de . bollgor od doids of "Tourish to half yar to gracers evicase men and who addenged and a seek him the past of the and and and and ont services that and are the care care care his syldence, he well as all the ether evidence in the ease as the the actual facts, shows he did receive the property dr che actual doe and dolder atom and aid as fractalled on 31 batlacech ad tand compare that that the exercised his rights as a southering persons. ody fact has antions a busyle of trainer painted for years a gal -teo and to adved our nego who er bette tame I gillestee sow deeds porables. Elailar regiles ands to somewhat similar overtions by the defeated to Antition belong out to Toologe, but 121, 148, mere hold by our improve owart insufficient to justify a jury in To writeral the cold gath Lon arone of the tower on gathert and entered Solfrey a Josef to the title time a maken to three of the contract egalnet such parky sincile have been allowed. In that desc the Asodd to Amendal odd benzowez tolzieth hiruse edd ret taken ofalleg a rosmo of anolicert: hit be come out home out the stree street. ludgment order confirming the exiginal judgment by confeccion, and the Supreme neurt affirmed to jumped of the Appellate court.

had the made present and fullering has presedent, the

judgment here will be reversed with a finding of facts and the cause remanded with directions to the Eunicipal court to enter a judgment order confirming the original judgment by confession that was entered in this case.

REVERSED WITH FINDING OF FACTS AND REMANDED WITH DIRECTIONS.

McSurely, J., concurs.

O'Conner, J.:

I agree with the equalization but not with all that is said in the opinion.

FINDING OF PACTS.

executed and delivered to plaintiff, Triangle State Bank, two promissory notes upon which judgment was confessed in this cause on February 6, 1930; that there is no evidence in the record from which the jury could reasonably find that said notes were given without consideration or that there has been any failure of the consideration for which the same were executed and delivered; that defendant is justly indebted to plaintiff according to the judgment confessed against defendant on February 6, 1930, in the kunicipal court of Chicago, and that said judgment so confessed should be confirmed.

jadgment here will be reversed with a finding of facts and the source of the source of

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kosuroly, J., cencurs.

O'Commor, I,:

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We find so from that deferdant, Milford A. Henkel,
is any notes upon which fuderent was confessed in this cause on
Nebruary 5, 1936; that there is no evidence in the record from
vitness canalderation or that there has been any failure of the
defendent in funtly indebted to plaintiff according to the judgment
confessed excinst defendant on February 6, 1930, in the huntelpal
court of Unicago, ear' that out fudgment we confessed should be

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WILSOE & SCOTT COMPANY, a Corporation, Appellant

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NATIONAL FISCAL CORPORATION, a Corporation. (MICHIGAN-CHIO BUILDING CORPORATION, a Corporation, Garnishee) Appelles. APPEAR FROM MUNICIPAL COURT

261 I.A. 643"

MR? PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On June 5, 1930, plaintist, Wilson & Scott Company, filed an affidavit for attachment in the Municipal court of Chicago against defendant, National Fiscal Corporation, alleging an indebtedness due from that corporation in the sum of \$331 for goods sold and delivered. On the same day a bond was filed and a susmons was issued to the bailiff of the Municipal court, which was returned that no property of defendant was found in the city of Chicago on which to levy the writ, and that by order of plaintiff's attorney the writ had been served on the Michigan-Chic building Corporation as garnishee. An alias writ afterwards issued and was served on defendant.

fendant by default and damages assessed at \$331. The time for the garnishee, Michigan-Chio Building Corporation, to answer was then extended ten days. August Wist the garnishee filed its answer in writing, in which it averred that at the time of the service and at all times thereafter it did not have in its possession and control any money, goods, debts, property or choses in action of any kind or description belonging to the National Fiscal Corporation, and that on the date of the service of the writ it was not indebted to said corporation. The answer further averred that on May 16, 1930, the garnishee recovered a judgment against the

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261 I.A. 643

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filed an affilavit for attachment in the hundring court of Chicago against detention, Aleging an cago against detention in the sea of [13] for goods indebtedness due from that corporation in the sea of [13] for goods and and delivered. On the same day a bond was filed and a su mone was issued to the builtir of the Municipal court, which was returned that no property of sefenders was found in the city of Chicago on which to lowy the writ, and that by order of plaintiff's attorney the writ, and that by order of plaintiff's attorney the writ had been corved on the kickenselms only and was corved on

antended ten days. August 31st the paraishes filed its snaver in satisfier, in which is averaged the garaishes filed its snaver in writing, in which is averaged that at the time of the service and at all times shorter it tid not have in its pennession and control any money, gards, debts, property or chesen in action of any kind or description belonging to the Mational Piscal Corporation, and that on the date of the nervice of the writ it was not indebted to eath corporation. The answer further average that on date to eath corporation.

National Fiscal Corporation for \$5700 and costs, which judgment remained in full force and effect and unsatisfied except for \$633.25, which had been received in partial satisfaction of the judgment. The answer was verified by the president of the garnishee company.

Plaintiff contested the answer and the matter was heard by the court, which found the issues for the garnishee, ordered that the garnishee should be discharged and entered judgment against plaintiff in favor of the garnishee for costs. From that judgment plaintiff has prosecuted this appeal to this court.

entitled "Michigan-Chio Building Corporation v. Rational Fiscal Corporation and C. Y. Schaffer." This record shows that on May 16, 1936, Michigan-Chio Building Corporation confessed a judgment against the Rational Fiscal Corporation and C. Y. Schaffer under the terms of a written lease for the amount of \$5700 and costs; that on May 31, 1930, defendants therein made a motion to vacate said judgment; that on June 4, 1930, Wilson & Scott Company presented to that court its motion supported by an affidavit asking that the court vacate and set aside the judgment obtained by the Michigan-Chio Building Corporation; that the court found that the affidavit filed in support of said motion and the matter set up therein did not give the court jurisdiction to entertain the motion, and that it was therefore denied.

Plaintiff contends that by virtue of section 88 of the Practice act (see Smith-Murd's Ill. Rev. State. 1929. chap. 110, p. 2187) the power to confess judgment is limited to "a debt bona fide due;" that a court is wholly without jurisdiction to enter a judgment by such confession unless for a debt which meets that description, and cites Baldwin v. Freydendall, 16 Ill. App. 106

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110, p. 2147) whe power to confess judgment in limited to "a debt

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holding. It is pointed out that the power to confess a judgment is one that is strictly construed, and that any departure from the authority conferred will render the confession void, as was held in Chase v. Dana, 44 Ill. 262, and Keen v. Bump, 286 Ill. 11. It is urged that where the warrant of attrney authorizes the confession of judgment at a future time, the entry of judgment before the expiration of the time designated is premature and without legal authority and the court is without jurisdiction of the person of defendant, for which reasons the judgment and all proceedings under it are absolutely void, and it is pointed out that this court so held in the case of Baering v. Spp. 247 Ill. App. 51, on the authority of White v. Jones, 38 Ill. 160.

Judgment by confession was entered May 16, 1930, and was for money claimed to be due under the terms and provisions of a written lease. Subdivision 3 of paragraph 25 of the lease provided in substance that the lease constituted and appointed any attorney of any court of record to be his attorney for him "and in his name and stead to enter his appearance in any suits that may be brought in any court in the state of Illinois, at any time when any money is due hereunder for rent or under paragraph 12 or any paragraphs of this lease as aforesaid ***. Paragraph 12, referred to, provided as follows:

"That the lessee will pay to the lesser at once upon the termination of this lease, in accordance with the provisions hereof, or upon the vacation of said premises by the lessee, a sum of money equal to the entire amount of rent by this lease provided to be paid and at that time remaining unpaid, including double rent as herein provided as the liquidated damages of the lessor, and to confess judgment against the lessee and/or his assignee for the amount or amounts due under this paragraph, and upon making such payment the lessee shall be entitled to receive from the lessor all rents received by the lessor from other tenants on account of said premises during the term originally demised by this lesse, provided, however, that the moneys to which the lessee shall so become entitled shall in no event exceed the liquidated damages last aforesaid, with lawful interest thereon."

helding, it is pointed out that the never to conform a julgment is one that is erricely constraed, and that may departure from held in these v. ham. Ad III. 255, and hear v. hum. 256 III. II.

It is arged that where the varriet of stancy actionizes the curflesion of judgment before the application of the time, the entry of judgment before the application of the time, the entry of judgment before the application of the time decignated is present tefore and without logal authority and the court is without judgment out all proceedings and all are entry to the pointed out that this court co held in the enes of beering void, and it is pointed out that this court co held in the case of beering void, and it is pointed out that this court contains the time case of beering void. App. 247 III. App. 21, on the

Judgment by confession was entered her 16, 1930, and was for meany claimed to be due under the terms and provisions of a written lease. Inhibitation 3 of puragraph 25 of the lease prosterney of any overt of record to be his attorney for him "and in his name and stead to enter his appearance in any cults that the way of little that the way of little that the whon any name is due here noter for reat or under paragraph 12 or when any mancy is due here mader for reat or under paragraph 12 or "erred to, provided as fullows:

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Plaintiff argues that the judgment was entered for rent that was not then due under the terms of the lease; that the lease began April 1, 1930, and ram for 25 months following; that the leasees, Sational Fiscal Corporation and C. Y. Schaffer, convenanted to pay as rent the sum of \$5685 in monthly installments of \$225, payable one each on the first day of every calendar month of the term, and that therefore on the day judgment was confessed only in two installments had matured. The record, however, shows/that case that the validity of the judgment entered in favor of the Michigan-Ohio Building Corporation was adjudicated upon the petition of plaintiff, and the adjudication having been made contrary to the contention of plaintiff, it cannot again litigate that question in this proceeding. Anderson v. West Chicago St. R.S.Co. 200 Ill. 329; Marie Church v. Tricity Church, 253 Ill. 51; People v. Marrison, 253 Ill. 625; People v. Russell, 283 Ill. 520.

vacation of the premises the lessees would pay to the lessor "a sum of money equal to the entire smount of rent by this lease provided to be paid and that at that time remaining uspaid." The declaration filed at the time judgment was confessed alleged that this entire amount had become due. Moreover, disregarding paragraph 12, at least one month's rent was due under the terms of the lease, so that although it might be held that the amount of the judgment was excessive it could not be held that the court was wholly without jurisdiction to enter the judgment. A judgment for too large an amount is erroneous but it is not necessarily void, as has been held in Adam v. Arnold, 86 Ill. 185, and Mavens, etc., v. First Mational Bank, 162 Ill. 35. Paragraph 14 of the lease gave to the garnishee the right to held any money or property of the National Fiscal Corporation in its hands as security for the payment of the

reat that was not then the under the terms of the lease; that the rease began April 1, 1930, and ran for 20 menths following; that the leases, Matternl Tiscal Corporation and C. V. Schaffer, conversation and C. V. Schaffer, conversation and to pay as rest the sum of \$5055 in menthl; sellowing the term, and that the value for the tay judgment was confessed only the term, and that the value for an the tay judgment was confessed only two installments had matured. The record, however, therefore the two installments had matured. The record, however, they that the contention of the judgment embered in fuver of the tente that the contention of plaintiff, it connect again litigate that to the contention of plaintiff, it connect again litigate that

Various, paragraph 12 of the lease provided that upon vacation of the provided vacation of the provided of memory equal to the embire amenat of reat by this lease provided to be paid and that that the remaining mapaid. The declaration riled at the time judgment was confressed alloged that this time is least that the confressed alloged that this at least one manth's reat was due onder the terms of the lease, so that elicity it wint to belt that the amount of the judgment was accepted it admit to belt that the amount of the judgment was jurisdiction to emter the judgment. A judgment for tee large an accepted it arrandom but it is not acceptable of the large an acceptable to the large and attitude its arrandom to held any memory or property of the factional standards of the factional standards of the payment of the standard of the standard of the payment of the

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obligation of that corporation, so that even if the judgment in question should be held to be void, the plainting garnicker in this case is nevertheless not entitled to recover and the judgment of the trial court is right on the merits.

The judgment is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

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34921

THE STEARNES COMPANY, a Corporation,

Appellant,

VS.

DR. GHURGE W. FUNCK, C. F. GRIGER, DR. CLYDE R. LANDIS and DR. G. E. MAXWELL, Appelloes.

appeal pron municipal court of chicago

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff has appealed from a judgment for defendants entered upon the verdict of a jury as instructed by the court at the close of all the evidence.

The amended statement of claim filed March 3, 1930, alleges that there is due from defendants \$1405.25 principal and \$100.31 interest, upon a certain promissory note for \$1533, dated December 15, 1928. The note is set up variatim and states:

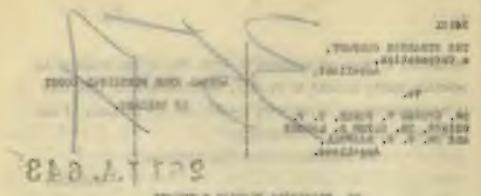
"Payable at the rate of \$127.75 per menth for 12 consecutive menths beginning 1/5/20 after date for value received we promise to pay to the order The Stearnes Co.; Fifteen dundred Thirty-Three and no/100ths Bollars at their Chicago office, 1333 3. Wabash Ave., with interest at 7% per annum after date until paid."

This note is signed by the Southwest General Hospital, Inc., by George W. Funck, Pres., and J. F. Beireis, Treas. It contains a power of atterney to confess judgment "at any time hereafter."
On the back of the note appears the following written guaranty:

"For value received, we, the undersigned, individually, severally and jointly guarantee the payment of the within note at maturity, and at all times thereafter, hereby waiving presentment and demand for payment, notice of non-payment, protest and notice or protest, and consenting, without notice of any kind, to any extensions of time, made by the holder of the within note."

This guaranty is signed by the defendants.

By an amended affidavit of merits filed karch 13, 1930, defendants Maxwell, Landis and Funck averred that the note was taken without consideration; that defendants were coerced in signing it; that they never received any consideration for signing



PRINCENCE THE WILLIAM OF THE CARE.

Paintiff has uppealed from a juignest for defoudants of uppealed by the court at the class of all the cridence.

The seement statement of chain filed harch 3, 1936, alleges that there is due from defectants \$1408.25 principal and \$100. A later t. the sate is out up yerharin and states:

Payable at the rate of 1127. To our month for 12 consecuneoning be insing 1/5/16 with date for value received re with thirty-inree and ma/lovene holines at their thicago office.

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This guaranty is signed by the defendance.

ly an amoutal afficavit of morita filed Lords 13,
1930, defendants hawrell, handle and Ausek averset that the nete

the alleged gueranty; that after the centract entered into by plaintiff with the Southwest General Mospital, Inc., was full and complete, plaintiff undertook to repudiate the contract unless defendants signed the note; that this contract was dated October 12, 1928, and was for the sale of certain merchandise to the hospital; that the contract was a conditional sales contract; that plaintiff at all times had the right and opportunity to take the merchandise from the corporation but elected not to do so and treated the matter as a complete sale, and thereby prejudiced the rights of defendants by creating damages which would not have existed had the merchandise been resold by plaintiff. Defendant Geiger filed an amended affidavit of merits which was substantially similar to the one filed by the other defendants.

plaintiff and was received, and other evidence was given tending to show that in December, 1928, plaintiff sold to the hospital in which the guarantors were interested, certain kitchen equipment as per written contract, which was also offered in evidence; that pursuant to an oral agreement the note was sent by plaintiff to the hospital with a letter explaining that defendants were to sign it as guarantors; that the note was returned duly signed by them and the equipment thereupon delivered. The transaction was therefore not without consideration. The credit extended to the hospital was ample consideration for the signatures of the guarantors.

Weger v. Robinson Nash Motor Co., 340 Ill. 81. Also, the note upon its face imports a consideration, and the burden of proof to establish the defense which the guarantors set up was upon them.

Defendants contend in the first place that us the contract of sale between plaintiff and the hospital was conditional, it was the duty of plaintiff upon the default of the hospital in

the alleyed guaranty; that after the contract outered into by plaintiff with the seuteret General Nospital. Inc., was full and that, it is the first the contract was a conditional seles contract; that in despital; that the contract was a conditional seles contract; that all times had the right and opportunity to take the marchandles from the sarperation but elected not to do so and treated the matter as a complete sale, and thereby prejudiced the rights of defeatunits by creating damages which would not have emighted in the marchandisc been recoid by pinintiff. Defeatentially intendent of the marchandisc been recoid by pinintiff. Defeatentially stilled an amended afriday of serits which was substantially that the marchanded afriday is of serits which was substantially

plaintiff and was received, and other evidence was given tending plaintiff and was received, and other evidence was given tending to show that in December, 1824, plaintiff sold to the houghtal in which the surrenters were interested, certain hitchen equipment as per written contract, which was also offered in evidence; that purmannt to an eral exceeded the note was sent by plaintiff to the heapital with a letter explaining that defendants were to sign it as guaranters; that the note was returned duly algoed by them and as guaranters; that the note was suple extended to the hospital was suple consideration. The modit extended to the hospital was suple consideration for the signatures of the guaranters.

The results of the defense which the guaranters out up was upon them.

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paying for the goods to retake the property and thus lessen defendants' damages. A large number of authorities is cited to the general rule that plaintiff may not avail himself of his own acts of misconduct the enhance the damages which he may recover (Russell v. Turner. 7 Johnson 188); that a party seeking redress for another's wrong must use due diligence to prevent loss (Karks v. Loomer. 4 Ill. App. 198); that diligence to prevent loss is the duty of one wronged (Graham v/ Eisner, 28 Ill. App. 269); that one injured by a breach of contract has the duty to make reasonable exertion to lighten the damage (Ford v. Ill. Refrigerating Co., 40 Ill. App. 222); that one injured by another through violation of the terms of a contract must be reasonably diligent and active to recoup his loss (Hall v. Paine, 224 Mass. 62.)

The rule relied on has no application to a case like this. The reservation of title to the goods sold was for the exclusive benefit of the vendor, and the vendor had an absolute right to waive that benefit provided he saw fit to do so. Shepard v. Mills, 173 Ill. 223; Dayton Scale Co. v. General Barket House Co., 248 Ill. App. 279. The rule of law upon which defendants rely in this respect is limited by plaintiff's right of election either to rescind and retake the property or to affirm the sale and sue for the purchase price. Smith v. Barber, 153 Ind. 322; Tannad & Delancy Engine Co. v. Hall, 89 Ala. 628.

Defendants say that no credit was extended because of the alleged guaranty; that the guarantors signed because plaintiff agreed to give title to the property to the hospital and not to require the usual chattel mortgage or conditional sales contract. Defendants further say that plaintiff did not give title as agreed but retained the title through a contract for a conditional sale; in other words, plaintiff failed to deliver the very thing agreed upon as the consideration for the guaranty.

paying for the goods to rather the property and thus leasen defeadants damages. A large number of nationities is sited to the rule that plaintiff may not avail himself of his own acts of mineonduct thismicance the demages which he may recover (huspell y furner, 7 fourness 100); that a party secking radress for the farmy, 4 ill. App. 186); that diligence to prevent loss is the defer of wronged (Ursham w/ himser, 20 ill. App. 186); that one is the faire of a wronged (Ursham w/ himser, 20 ill. App. 186); that one is the faire of a secking radiation of the terms of a centract and be reasonably diligent and sotive to resonably diligent and sotive to resonably diligent and sotive

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There are several answers to this contention. In the first place, the mere failure of the payee of a note to keep the promise which was the consideration moving to the maker, does not amount to a failure of consideration as against the guaranter of the note. Gage v. Lewis, 68 Ill. 604: Newton v. Clarke, 138 Ill. App. 196; Western Pine Lumber Co. v. Nelson, 189 Ill. App. 41. In the next place, the defense of failure of consideration was not set up in the affidavit of merits and under the practice in the Municipal court must be regarded as waived. Gooder v. Anderson. 246 Ill. App. 1.

For the same reason as last above stated, defendants cannot maintain another defense which is apparently urged in this court for the first time - that the debt had not matured at the time suit was started. There is no doubt of the general rule that in a suit at law the cause of action must exist at the time the suit is begun, but the contract between the parties provided that on default in the payment of one installment the whole indebtedness might be declared due; and since the affidavit of merits did not set up this defense specifically it will be presumed that the whole debt had been declared due pursuant to that provision of the contract.

The law and the facts being as heretofore stated, it is apparent that not only did the court err in directing the jury to return a verdict for defendants upon the facts, but, on the contrary, as a matter of fact and of law, plaintiff is entitled to recover from defendants on the guaranty for the emount of its claim.

For the reasons indicated the judgment is reversed with a finding of facts and judgment here against defendants and in favor of plaintiff for the amount of plaintiff's claim.

REVERSED WITH A FINDING OF FACTS AND JUDCHENT HERE AGAINST DEFENDANTS AND IN FAVOR OF PLAINTIFF. There are several abserts to this contention. In the content of th

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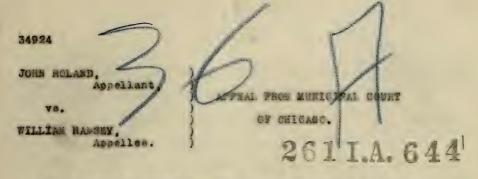
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Property and Authority, 501, second-

We find as facts that under the evidence in this case there is due from defendants, Br. George W. Funck, C. F. Geiger, Dr. Clyde R. Landis and Dr. G. H. Mazwell, the sum of \$1468.38, with interest thereon at the rate of 7% per annum from the 25th day of November, A. D. 1930, to the 6th day of April, A. D. 1931, amounting to \$37.40, making a total sum of \$1505.78, for which plaintiff is entitled to judgment in this court against said defendants.

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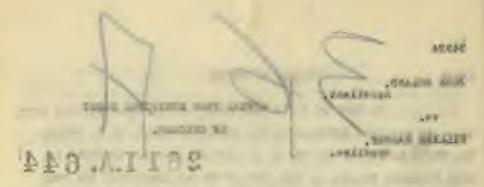
ER. JUSTICE RESURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained possession of an autosobile truck from defendant under a replevin writ, but upon trial by the court suffered an adverse judgment and the truck was ordered returned to the defendant. Plaintiff appeals.

The evidence shows without contradiction that at one time the truck belonged to Herry R. Young, who sold it to his mother-in-law, Lula B. minor; after one bought it she leaned it to her son-in-law, Young, to use; it was subsequently conveyed by Mrs. Minor and her husband to the plaintiff, John Roland. The bill of sale to plaintiff was introduced in evidence. A certified copy of the bill of sale from Young to Ars. Minor was also offered, but the court santained an objection to it. The assence of the original was accounted for and the certified copy was competent evidence and should have been admitted.

Plaintiff testified was he did not get physical possession of the truck when he received the bill of sale, and the court thereupon announced its opinion that plaintiff, having failed to get possession at the time of the sale, could not maintain the action in replayin and upon this basis found against him.

Physical delivery of a chattel sold is not necessary to pass title as between the parties to the sale. Wade v. Moffett. El Ill. 110; Barrow v. Window. 71 Ill. 214; barner v. Buchnell, 75 Ill. 220; Webster v. Granger, 78 Ill. 230. The bills of sale made out a prima facig case of ownership in the plaintiff and he was entitled to



- FORTH ASSOCIATION OF GRIDE OF SPICESOFF. -

Plaintiff ebbained possession of an automobile truck from defendant redet a rest wit, but noon trial by the court addfered an adverse judgment and the truck was ordered returned to

The ovidance shows souped contradiction that at one in the test of the circumstance of the circumstance of the circumstance of the conveyed by Mrs. Minor and nor insband to the plaintiff, John Moland. The bill of pair to paintiff was introduced in evidence. A certified copy of the bill plaintiff was introduced in evidence. A certified copy of the bill of said from the circumstance of the critical was accounted thin objection to it. The recence of the critical was accounted thin or this said the copy was congressed evidence and chould have

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the possession of the truck. Under the statute he could maintain the action. Section 1, chapter 119, "Replevin."

Defendant makes the point in support of the judgment that there was no evidence as to the character of defendant's possession, and the rule is that where a party obtains possession lawfully an action of replevin cannot be maintained until a domand has been made and possession refused. No demand was made prior to issuing the writ. Demand, however, is not necessary where the taking is unlawful or where demand would be unavailing. C. R. I. & P. R. R. Co. v. North American C. S. Co., 244 Ill. App. 531. The record before us is silent as to the possession of defendant, except as shown by the return on the writ. A witness was asked to explain the possession of the defendant, but the court sustained an objection to this question. The witness should have been allowed to answer. If it could be shown that defendant did not lawfully come into possession or that a demand for the return of the truck would be useless, it would be unnecessary to make any demand before the issuance of the writ. Testimony should be received on this point.

For the reasons above indicated the judgment is reversed and the cause remanded.

REVERSED AND REGARDED.

Matchett, P. J., and O'Connor, J., concur.

the passession of the truck. Vader the statute he could vointein

impumbut out to ivarque at sulpy and notice inchestell at timbertab to reservate add of or seachive on ear event fads possession, and the valo is that where a party obtains pessesses basnob e litau banisteles of forme alvelos to moite as yllutval has been aude and preservion relived. In demand was made wrier to issuing the writ. Demand, honever, is not necessary where the taking is unlartful or where demos would be uneralling. C. H. I. A P. T. T. Te. v. Prett decident C. C. Pr., 144 Ill. Apr. 481. rease a factor of the contract of the general and the factor of the party of the pa as chows by the return on the writ. A witness was soled to exclusing the passentem of the largedant, but the court assistant on objecof baveles and word him de send of the grant of the baveles all of the barelone. seen viluted for his tester to Jast sweet of time of it. into noussess or that a decent for the return of the truck well a he need equ. it would be abstracted by make our decoral before the issuance of the well. Testimons should be received on this point,

For the reasons shullested the judgment is

REVISED AND HEHARDER.

Matchett, P. J., and O'Somer, J., schour.

34845

GRORGE F. STEGER

VB.

CHRIS G. STEGER at al.

CHRISTINA HROUNTOS et al., Intervening Petitioners, Plaintiffs in Brror,

VB.

GEORGE F. STEGER et al.. Defendants in Error. cook county.

MR. JUSTICE O'CONFOR DELIVERED THE OPINIOR OF THE COURT.

By this writ of error Christina Mrountos, Gust
Spirrison, William Dadas, John Dadas and Peter A. Contes, intervening
petitioners, seek to reverse a decree of the Circuit court of Cook
county sustaining a demurrer to their intervening petition and dismissing it for want of equity at their costs.

The record discloses that on June 6, 1982, the Chicago Title and Trust Company, as conservator of the estate of George F. Steger, insane, filed its bill to construe Article 20 of the last will and testament of John V. Steger, deceased, on the ground that it was ambiguous and uncertain in its meaning. Afterwards the bill was amended so as to specify, with more particularity, the alleged uncertainty of Article 20 of the will. Mone of the intervening petitioners was made parties to the suit, but the defendants to the bill demurred.

Little was done towards the prosecution of the suit until April 8, 1939, when counsel filed a motion on behalf of George F. Steger, setting up that by an order of the Circuit court of Cook county he had been restored to his reason and to all his rights and privileges enjoyed by him previous to the time when he was adjudged insane, and moved the court that he be substituted as complainant



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in lieu of the Chicago Title and Trust Company as his conservator. and he further moved the court that the suit be dismissed. At that time counsel for the intervening petitioners, who had not yet interyened and were not parties to the suit, advised the court that he represented several persons whose claims had been allowed against the estate of George F. Steger by the Probate court of Cook county. where the estate was being administered, and that there was no estate in the hands of the conservator, the Chicago Title and Trust Company, with which to pay the claims, and objected to the granting of either of the motions. He further stated to the court that he intended to present and file an intervening petition in the nature of a cross-bill on behalf of the creditors of George F. Steger, whose claims had been allowed by the Probate court, to the end that such claims be paid out of any property coming to George F. Steger under the will of his father, John V. Steger, deceased, and asked leave to file such intervening petition. The court refused to pass upon the motions but postponed a consideration of them to May 1, 1929. Afterwards, on April 11th, George F. Steger filed his written motion that he be substituted as complainant and that the suit be discissed.

that date three orders were entered. By the first it was ordered that George F. Steger be substituted as complainant in lieu of the Chicago Title and Trust Company as his conservator. The second order recites the coming on to be heard of the motion of George F. Steger to dismiss the suit and that the motion was desied and overruled. The third order recites the motion of the parties who sought to intervene; and it was ordered that leave be given them to become defendants to the suit and to file their intervening petition in the nature of a cross-bill. It was further ordered that the cross-defendants plead, answer or desur within 30 days and that summers issue for certain other cross-defendants. Apparently the intervening

in lieu of the Chicago Title and Proct Company as his comearwater. and he three moved the court that the displaced. -result for the the twenter pertitioners, who had not yet interyourd and wore not parties to the suit, advised the court that is famings bowells med bad mainly occurs angers | fartered b | | | | | | | | the estate of George 1. Steper by the Probate court of Good county. escape on as event thus but becataining and event there are in the hands of the commerciat, the Chicago Title and Trust Company, tentile it antimers one to be evered one, and to see of notice with or beliment and that stude and or bestate apile of all et' tile mottens. frid-many as to exceed at all strang and average as offt has success on behalf of the creditors of deerge I. Stager, whose claims had nd print of the Problem one one one one one of the same in a same of the need like any manual temporal of agreement property of the first himse tails father, John V. Steger, deceased, and abled leave to I'll a and intervening politica. The court refused to pass upon the natime but passing a case transfer of these to any 2, 10.0. wards, on April lith, Secret V. Heager Tiled his written medien that hemilials of this out that has the distinct as bette itades of of

in May 3, 1939, the notions came on to be heard, and on that George F. Steger he substituted he complained in lieu of the that George F. Steger Chiese despeny as his conservator. The cocond order resides the coulng on to be heard of the motion of George F. Steger to dismise the auti and that the notion was denied and everraled. The third order residue the motion of the parties who sought to later-third order residue that leave be given that to become defendants to the autit and it was ereined have leave be given that to become defendants to the autit and finit the order. It nature of a sweet it is the parties and that the order. It has formants of a sweet or desar atthin 36 days and that becoments.

petition was filed on this day, although it does not appear in the record. June 3, 1929, the intervening petitioners filed their answer to the bill of complaint. Afterwards the cross-defendants demurred to the intervening petition. The desurrer was confessed and the intervenors given leave to file an amended petition, which they did on October 11, 1930. The cross-defendants again desurred to the amended petition, and on October 31, 1930, the desurrers to the amended intervening petition were sustained; the intervenors elected to stand by their intervening petition and it was dississed for want of equity. The decree then recites that the desurrers to the amended and supplemental bill came on for hearing; that complainant confessed the desurrers, and the suit was dismissed for want of equity at complainant's costs and the intervenors prayed and were allowed an appeal. It is to reverse this decree that the intervenors pruse-cute this writ of error.

The substance of the allegations of the amended intervening petition is that on December 27, 1920, Chris G. Steger filed a petition in the Probate court of Cock county to have his brother George F. Steger, the complainant, adjudged to be an insane person, and that he was so adjudged by the Probate court; that on January 28, 1921, the Chicago Title and Trust Company was appointed conservator; that it qualified and centinued to act in that capacity until April 2, 1929, when proceedings were had in the Circuit court of Cock county upon appeal from the Probate court, whereby an order was entered that he had been restored to reason and stating that he was capable of managing his estate and the conservator was discharged from further control, and it was directed to file its final report in the Probate court of Cock county. That more than forty years ago John V. Steger had established the business of manufacturing and selling pianos and continued in that business until his death June

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The control of templains. Afterwards the arran-defendants detain intervenors given leave to file on seconded prolition, which they the intervenors given leave to file on seconded prolition, which they did on totaber 11, 1930. The orace-defendants again semurated to the seconded potition, and on dutaber 21, 1930, the demursars to the amended intervening potition were sectoiced; the demursars to the control of equity. The doorse than restice that ine desurrars to the assended supplemental bill came on for tearing; that complemental bill came on for tearing that came and on appear.

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solling planes and continued in that business of manufacturing and

11. 1916: that his company was incorporated but that he remained in control. The petition than sets up the large growth of the plane business and that for a period of about twenty years the Stegers. who controlled the business adopted a course of dealing with their employees, some of whom are the intervenors, whereby the employees would deposit with the Stegers part of their earnings for safekeening: that in 1930 these deposits aggregated more than two million dollars; that those employees who made such deposits were favored in employment and promotion; that at the time of the death of John V. Steger in 1916, he neld title to real and personal property of the value of about six million dellars; that two million dollars of this was the money deposited by the employees; that John V. Steger left a last will and testement, admitted to be probated in the Probate court of Cook county, whereby he disposed of all of his real estate except a few minor legacies in trust for the benefit of his widow and his sons and daughters, and that by the will Whris C. Steger, George F. Steger and other purties were named as trustees. The petition then sets up Article 30 of John V. Steger's will (the construction of which was the sole object of the bill of complaint). and it is then alleged that Article 20 was void and therefore the beneficial interests of the trust estate were devised and bequeathed to George F. Steger, Chris G. Steger and other parties, and that George F. and Chris G. Steger each became vested in an undivided onehalf interest to the residuary estate of John V. Steger, deceased.

It was further alleged that "in or before the year 1920, Chris G. Steger and George F. Steger" entered into a conspiracy to defraud the employees of the Piano company out of their money which they had deposited as above stated, and that the deposits made by the employees and the receipts for such deposits had been conducted solely by George F. Steger in his individual

11. 1916; that the samples out from the same of that the training of the control, the parties over the term of the control of the parties of the parties of the control o such and that the a gentled of the termine yours the Searce, that only not so it owners a defunda summer out to live and the employers, were to when her his intervence, we will be annual part -orse we't mainten the drag congest and with the congest blue -fin out that the thought appoint and the the the the age affiliant him blue life proget of saids plat greatful mair dinch and to call and in Indianana has improved an Prioret of John V. Roomer in 1916, he had blile he wool and personal propmailing out just jour lib molista als suode to obser out to you dollars of this was the neary deposited by the ampleyers that John has der as as he salmbe , sacantact but lily sall a Stel tagets .V in the Probate court of Cook senery, wherehe he disposed of all of tioned sub tot tours in malagal touch a sycono citto fact ala at the widow and his cond doughtest, and that by the will light to . Courge F. Steger and other partice were named as trastene. The position then note as duricle at from V. Stegger's will the . (suletimes to like and to the object of was lake in aclarations.). one the character and the law of what he was the the star of the hedrened has healted war exacts duri to adopted Laleltoned th Courge J. Steper, Darie E. Phague and winer parties, and bind -ess heafelfon on at horsey encode there welled at the Marten Des half interest to the residing retain of John V. Stener, decemed.

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capacity, and that he had received and used all of such money persenally and without authority from John V. Steger or Chris G. Steger or the Steger company; and that therefore no one was liable but George F. Steger, and that he had been for a long time mentally unsound and irresponsible; that in pursuance of the conspiracy Chris G. Stewer filed his petition in the Probate court to have George F. Steger adjudged to be an insane person, although he knew that George was not insane; that after the appointment of the conservator by the Probate court, the conservator, at the request of Chris G. and George F. Stoger, caused all persons who had made deposits as aforesaid to file their claims in the Probate court in the censervatorship proceedings, and that claims of nearly one million dollars had been so filed and allowed by the Probate court; that the intervening petitioners' claims were thus allowed: Hay 25, 1921, Peter A. Contes, \$9,000; January 13, 1922, William Dadas and John Dadas, \$4,000; July 13, 1922, Christina Brountes. \$10,000; July 13, 1932, Gust Spirrison, \$5,000; and that they were still due and unpaid; that the conservator filed its inventory of the estate in the Probate court of Cook county showing divers items of real and personal property, all of which had been disposed of except the interest of George F. Steger under the will of his father, and that the moneys derived from such sale had been all used in the expenses of administration and that the claims were wholly unpaid.

It was further alleged that by reason of the fraud perpetrated by Chris G. and George F. Steger in having the collusive proceeding instituted in the Probate court to have George F. Steger adjudged insane, the intervenors were induced to forego filing any suits at law against George F. Steger, it having been represented to the intervenors that there was sufficient property belonging to George F. Steger in his estate to pay all claims allowed.

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to the intervenues that there was sufficient property belonging to
teerge F. Steger in his swinte to pay all claims allowed.

Upon information and belief it was alleged that the intervenors will be unable to reach any equitable interest of George F. Steger to satisfy their claims unless they are allowed to intervene in the instant suit. And it was further alleged upon infernation and belief that the residuary estate given to the trustees under Article 20 of John V. Steger's will principally consists of 980 shares of stock of the Fianc company, real estate and leavehold interests, some of which real estate is subject to the dower rights of the widow of John V. Steger, deceased; that in 1922 the Piano company manufactured about 40 pianes a day, had about 12:0 employees and had no funded indebtedness; that it had about one million dollars in banks in Chicago; that for the past four or five years the company desied to manufacture and sell pianos and was operating morely for the purpose of liquidation: that its financial condition was "extremely desperate;" that the sole purpose of continuing the business was to dispose of its assets which consisted principally of lands, buildings, machinery, equipment, materials, etc.; that the property was rapidly deteriorating; that despite this condition the officers and directors continued to maintain a large office and factory force at great expense - much larger than was necessary; that the trustees of the estate of John V. Steger, deceased, were drawing large and exorbitant calaries; that the assets were being thus dissipated; that no audit of the financial affairs had been made for several years: and that by this emission it was the purpose of Chris G. Steger to fraudulently conceal the expenditures; that if the property of the company was properly liquidated a large part of the expenses would be eliminated and a fund created which would go to George f. Steger so that the intervenors might be paid.

It was further alleged upon information and belief that since George F. Steger was adjudged insene in 1880, the total income paid to him or to his conservator was approximately \$14,000.

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but that his true income was at least \$25,000 a year, or a total of not less than \$200,000; that in the year 1928 the statute of limitations had apparently run against all of the claims of the employees for moneys deposited as above stated, and when the statute had run, George F. Steger and Chris G. Steger, in pursuance of their conspiracy, caused the order to be entered by the court restoring George and discharging the conservator; that if the parties in charge and control of the business and assets are allowed to continue all of the assets will be dissipated by unnecessary and exorbitant expenses; that the Piane company occupied space in a downtown building belonging to the estate, of the rental value of \$28,000 or \$30,000 a year, but had paid no rent, and the trustees had made a claim therefor; that further claims are being made by the trustees; that the conservator, while in charge of the estate of Coorge F. Steger, income, had demanded that the trustees cause the Piano company to vacate the premises occupied by it, but without result: that Chris G. Steger, while acting as trustee under the will of John V. Steger, deceased, had charged large sums of money for fictitious supervision and management of the building, aggregating \$60,000; that the estate will continue to be dissipated unless the court takes jurisdiction of the intervening petition and compels an accounting by the trustees and the trustees be removed; that the petition is brought on behalf of the intervenors and all other creditors similarly situated who desire to join.

The prayer of the petition is that the intervenors be awarded "their just and equitable costs and expenses *** including counsel and solicitor fees *** and "including costs of invertigation; that the cross-defendants answer the intervening petition; that an account be taken; that the trustees and other parties may be decreed to pay to the trust estate such sums as it may appear

lased as we come a mino, the Parell in any second most all food for To studies and part and sail at daily 1000, 0000 mass enof for he limitations had appearently ran against all as the alabas of the sployees for memora deposited as above stated, and when the statute had rum, Casego F. Stegor and Chris G. Stegor, in nursusonis of their manelmany, named the order in he mineral by the The dad transportation and transporter party and alter transport was aftered has necessary and be Denimer has excess of entires and allowed to conficus till of the assets will be disapped by tenseussary and emerbitant excomment; that Heav sprayary complet chans to a downtown bulking belanging to the cotate, of the rectal value esejours out the last of blag had sed the controls to controls to had made a claim therether; that l'arther claims are being made by oduses that the the caretyvise, wells all energy the the or George N. Stoner, tenence, had demanded that the tructer to the Fiane company to vector the promises complet by it, but without Personal Real Corte C. Plager, willy noting as Vryates union Can will of John V. Stogen, decement, had charged large same of memory . Janeanna , militud out to the manas bue moisiveres anditioit and and the posterior in a state of the state of allaques has maitiful quinoverial and to not stituing asket tures and an accounting by the tractes and the trustees be removed; that the ratio Lia has gromeyupini and to limbed as i.v. word at mais itog sections similarly of Colors and Lealing La Jain.

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they have received in excess of their reasonable charges; that a receiver be appointed to take charge of the property of John V. Steger, deceased, and of the Piano company, with power to sell all the assets and that all persons who have received money and who are employed in the conducting of the estate and of the company be deoreed to account for and repay all they have wrongfully received; that the court "review the payments made *** for atterneys' fees. detective and other charges," etc.; that the Piano company be decreed to vacate the premises occupied by it in the downtown building; that the trustees be removed and suitable persons appointed in their stead; that the court construe Article 20 of the will of John V. Steger, deceased; that the trustees and other officers and directors be enjoined from making any further expenditures or payments of money without first obtaining leave of court; that they severally submit a detailed and itemized list of assets and income and disbursements received and made by the trustees: that a statement of the assets and liabilities of the Piano company during the trusteeship, be made; that George F. Steger be decreed to pay to the petitioners the amount found due on such accounting, together with the petitioners' costs and charges, "as well as counsel fees, solicitor's fees and investigation and litigation expenses;" that George F. Steger be enjoined from selling or receiving or from meddling is any way with any of his assets, whether held by him or by any other person in trust for him.

Counsel for the complainant centends that the demurrer to the amended intervening petition was properly sustained for three reasons: (1) That the intervenors "have no such interest in the will of John V. Steger as entitles them to maintain an intervening petition to construe that will. (2) That they have no right to maintain the intervening petition as a creditors' bill because they have not exhausted their remedy at law;" and (3) That irrespective

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to the emended intervening petition was properly sustained for three reasons: (1) Yant tes intervenens "have no main interest in the will of John V. Stener as cusitles them to maintain on intervening mobilion to construct that will. (2) That they have no right to maintain the interposing continue as a creditors' bill become they have not stimusted that their second terms and (3) That irrespective

of these two questions, the desurrer to the assended intervening petition was properly sustained because the "amended intervening petition contains no allegations which would entitle the intervenors to any discovery or relief" as against cross-defendants Louisa Rosina Steger, Marie Stella Northen, Anna Bellie Johnson and Estella Henrietta Hinman.

In this state the right to intervene in a suit, not having been made the subject of statutory regulation, is governed by the general rules of equity. Wightman v. Maryan Co., 217 Ill. 371. In that case there was an appeal from an order dismissing an intervening petition, and the question for decision was whether the intervenors had such an interest in the suit as would entitle them to become parties to it. The court there discusses the rule of law in such cases and said that some states had enacted statutes authorizing intervention under certain facts and circumstances under which persons having an interest might intervene, and said p. 376: "We have no statute extending the rights of parties to intervene except in attachment cases where a stranger to the proceeding claims property attached. In this state, therefore, the right of intervention must be centralled by the general rules in equity as to the answer of the proper parties. 'In equity no one is entitled to be made or become a party to the suit unless he has an interest in its object. But it is the usual practice to permit strangers to the litigation, claiming an interest in the subject matter, to intervene on their own behalf to assert the titles. '*** The rule in the United States courts is, that 'persons who are not parties to a suit having no standing in court to enable them to file a petition in said suit. If they have any occasion to ask any relief in relation to the matters involved in said suit or to the proceedings therein they must file an original bill. *** Strangers to a cause cannot be heard therein, either by petition

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or motion, except in certain cases arising from necessity, as where the pleadings contained scandal against a stranger, or where the strangers purchase the subject of litigation pending the suit, and the like.' The court then quotes from <u>Marsh v. Green</u>, 79 Ill.

385, and <u>Shanahan v. Stevens</u>, 139 Ill. 428, and continuing said, p. 377: "From the foregoing text and decisions we understand the rule to be no more or less than that parties having an interest in the subject matter of the suit in equity, and who are either necessary or proper parties to such suit, if not made so by the plaintiff, may come in by way of application to intervene and be made parties."

The court then referred to the general rule permitting parties to intervene in a chancery suit, and said, p. 378: "If we turn to the decisions rendered by the various courts in those jurisdictions in which statutes are in force authorizing intervention, we find that they hold, without exception, that the interest which will entitle a party to intervene must be an interest in the matter about which the litigation is to be, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment, - that is, the interest must be one created by a claim to the demand of property in suit, or some part thereof, or a lien upon the property, or some part thereof, which is the subject matter of litigation."

The court then quoted with approval from a Louisiana case (1 La. Ann. 4725) as follows: "This, we suppose, must be a direct interest, by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties, otherwise the strange anomaly would be introduced into our jurisprudence of suffering an accumulation of suits in all instances where doubts might be entertained or enter into the imagination of subsequent plaintiffs that the defendant

or motion, eraspt in cartain annes arising from necessity, as more that the pleadings obscained demaded against a stranger, or where the the like. 10 fas court then quetes from Maria v. Green, 79 III.

355, and Giornius v. Glaveris, 136 III. 486; and continuing said,
3. 377; "From the foregoing test and decisions we understand the
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against whom a previous action was under prosecution might not have property sufficient to discharge all his debts."

And further, the court said, p. 361: "The reason for thus qualifying the right to intervene rests upon the principle that parties to a suit have the right to proceed with it to final Judgment or decree free from interference by others, and if parties desire to obstruct the litigation, except as qualified in the foregoing, they must do so by an original action."

In considering this rule the court, in <u>Bossert v.</u>

<u>Drainage District</u>, 307 Ill. 425, said, p. 429: "The intervening party must have an interest in the subject matter involved, which may be adversely affected unless he is made a party."

Applying the rule as above announced by our Supreme court to the instant case, we are of the opinion that the decurrer was properly sustained to the intervening petition. The intervening would not gain or lose by the entry of a decree if one were entered as prayed for in the bill of complaint. That bill asks only that a decree be entered construing article 20 of the will of John V. Steger, deceased. It has not been pointed out by counsel for the intervenors how the interveners' interest, if any, would be affected by the construction of article 20. Complainant, who filed a simple bill for the construction of a part of the will, ought not be compelled to litigate this single issue with matters foreign to the bill.

In the instant case the petitioners not only seek a construction of Article 20 but they also seek to bring into the litigation a great many matters foreign, as will appear from the allegations of the assended intervening petition above referred to. They seek to have an investigation of the Piano company's business covering a period of more than twenty years. They charge a conspiracy in the appointment of the conservator of George F. Steger. They

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charge that the business of the Stegers was fraudulently and extravagantly conducted; that large and exorbitant salaries were paid; that the management of the business was extravagantly and fraudulently conducted; they ask that the trustees be removed and others appointed in their stead; they ask for a receiver to take charge of the property, and that their counsel and solicitors' fees be paid.

intermenors discloses the fact that the expenses of the litigation which they seek would be enormous and protracted. In these circumstances we think they ought not be permitted to intervene, but should, if they so desire, file an original suit as stated in the Fightman case. We think a great many matters set up in the intervening petition are not germane to the original suit, and therefore the intervening petition was desurrable. Rearney v. Rirkland. 279 Ill. 516.

the motion of George F. Steger, the substituted complainant in the bill to dismiss the suit, was made too late because it was after the intervening petitioners had asked leave to file their intervening petition in the nature of a cross-bill. We think this contention is not borne out by the record, as we have above heretofore stated. George F. Steger's motion to dismiss was made before the motion of the interveners for leave to file their intervening petition. It has been held in this state that the complainant has an absolute right to dismiss his suit at any time unless a cross-bill is filed. Purdy v. Hensles, 97 Ill. 389; Rohler v. Wiltberger, 74 Ill. 163; Paltzer v. Johnston, 213 Ill. 338; Langlois v. Hetthie-

sen, 155 Ill. 230. Whether this matter is properly before us, we do not pass upon, since it has not been argued by counsel for the complainant.

For the reasons stated the decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

harge that the trainson of the Stegers one frauditently and extravathe management of the business was extravagently and frondulently anducted; thay wek that the tractees be racedest and others appointed in their stead; they sat for a receiver so take enarge of

A ware statement of some of the requests mode by the statement of the statement of the color and protracted. In this circumstant the color and thick to intervene, but should, if they so dealer, file an original suit as stated in the statement case. So this a great many matters act up in the tree-reading position are not germane to the criginal aut, and therefore that intervening political statements. Secured y, litriana, 179

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Cook county in affiner.

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JOHNSON SERVICE COLPARY,

Appellee,

VS.

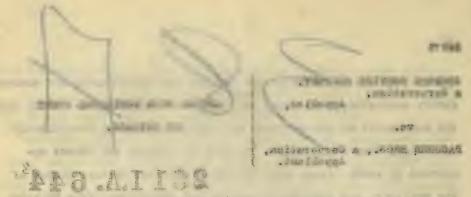
PASCHEN BROS., a Corporation, Appellant. APPIAL FROM MUNICIPAL COURT OF CHICAGO.

261 I.A. 644

MR. JUSTICE O'COMPOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$2490 claimed to be due and owing to it for materials furnished and services performed in connection with the construction of the Carbon and Carbide Building in Chicago. Plaintiff's claim is predicated on a written agreement made by the defendant that if plaintiff would not file its claim for lien against the building the defendant would pay plaintiff's claim. There was a trial by the court and a finding and judgment in plaintiff's favor for \$2429, and defendant appeals.

The record discloses that the defendant was the general contractor in connection with the construction of the Carbon and Carbide Building: that the John Degnan company, a corneration, had entered into a sub-contract with defendant to do a part of the work and the John Degnan Sompany had entered into another centract with plaintiff, the Johnson Service Company, a corporation, whereby the latter agreed to do a part of the work mentioned in the Degman contract. Plaintiff performed the work and there was a balance due it of \$2429, which plaintiff had been unable to collect from the Degnan company and had taken the matter up a number of times with the defendant, the general contractor, stating that plaintiff's bill was due and unpaid, that plaintiff had received no money from the John Degnan company, although plaintiff's work had been completed, and that plaintiff's right to file a claim for lien would expire on September 26, 1939, and unless plaintiff received payment before September 23rd it would take steps to file its claim for lien on



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the building. Afterwards defendant wrote a letter to plaintiff, which is the basis of plaintiff's claim and which is as follows:

"Re: Carbon and Carbide Bldg. Gentlemen: In accordance with our telephone conversation of even date, we, herewith, agree to pay in full your account with John Degnan, Inc., on the above job, as soon as we receive affidavit from John Degnan, Inc. Very truly yours. Paschen Brothers By A. W. Dubs."

A witness for plaintiff testified that he telephoned the defendant advising it that plaintiff was going to file a claim for lien on the building; that the secretary and treasurer of the defendant replied that it would be very embarrassing for Paschen Brothers and the Carbon and Carbide Company for plaintiff to file a claim for lien; that the witness then replied that the claim would not be filed if the defendant would guarantee and pay the account and give plaintiff a letter to that effect; that defendant agreed to do this, and thereafter plaintiff received the letter above quoted. The evidence further shows that the affidavit mentioned in the letter above quoted was delivered to the defendant.

The defendant contends that the promise of the defendant made in the letter was without consideration and therefore void. We think it clear this contention cannot be sustained. The promise of the plaintiff not to file its claim for lien against the building was a sufficient consideration for the defendant's promise to pay the bill against the John Degman company, and the promise being in writing is legal and valid. <u>Merbert v. Mueller</u>, 53 Ill. App. 391; <u>Cornell v. Central Electric Company</u>, 61 Ill. App. 325.

The defendant further contends that the writer of the letter upon which plaintiff sues was without authority to bind the defendant; but this contention is not available to the defendant because in its affidavit of merits it admitted the writing and de-

the building. Afterwards defendent wrote a letter to plaintist, which is the bests of plaintist's class and which is an follows:

"Mo: Carbon and Carbids Eldy. Sentlemen: In econdance with our telephone conversation of even date, we, herewith, agree to pay in full your account with Soin Degree, Inc., on the shove Job, as soon as we receive affiderit from John Beynen, Inc. Very truly young, Sanchen Brothers By A. W. Duba."

for lies on the building; that the secretary and treasurer of the for lies on the building; that the secretary and treasurer of the factors are replied that the flat the following second to this, and thereafter plaintiff received the letter agency the street to this, and thereafter plaintiff received the letter above case the the affidavit acmiditions in the letter above the flat the defendent.

The defendent contends that the premiss of the defendant made in the letter was without consideration and therefore void. To think it diear this sentention cannot be nustained. The premise of the plaintiff not to file its claim for lien against the building was a sufficient consideration for the defendant's premise to pay the bill against the John Degman company, and the premise

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livery of the letter which was set forth verbatim in plaintiff's statement of claim.

a further point is made that the court improperly restricted the defendant when it sought to put in evidence concerning
the bankruptcy of the John Begnan company, which was then pending
in the Federal courts; that the evidence shows plaintiff filed its
claim against the bankrupt and therefore could not have two recoveries upon the same claim. There is no evidence that plaintiff
received any money on account of this claim in the bankruptcy
court, but on the contrary the evidence is to the effect that
plaintiff had not been paid any part of its claim. Of course,
plaintiff can receive but one satisfaction of its claim, and if
this judgment is paid by the defendant it would be entitled to any
amount ceming to plaintiff in the bankruptcy proceedings on the
ground that it was subregeted to plaintiff's rights.

the trial that plaintiff could have maintained its claim for lien on the building, and that ubless this were shown there was no consideration for defendant's promise. We think this contention is not in accordance with the law because it appears that plaintiff was honestly asserting its claim for lien; this was sufficient.

Genell v. Central Electric Co., supra. In that case it was held that an agreement to forbear to sue for a certain time is a good consideration to support a promise to pay and that it was not material that the plaintiff's right to recover shiuld exist; that if plaintiff's claim, although a doubtful one, was honestly asserted, the agreement to forbear was a sufficient consideration. The court there said, p. 327: "Nor is it material that the certain right to recover in the suit forborne should exist. If the right were honestly asserted, though a doubtful one, the agreement to forbear

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1ts prosecution is based upon a sufficient consideration. Honeyman y. Jarvis, 79 III. 318; Pool v. Docker, 92 III. 501; Knotts y. Preble, 50 III. 226."

A further point is made that since there is evidence to the effect that plaintiff might have collected the amount due it from the John Begnan company, but neglected to do so, and since it further appears that the defendant paid the John Degnan company the amount of its contract, which included the amount claimed by plaintiff, the loss should be borne by plaintiff, both plaintiff and defendant being innocent parties, and that plaintiff's negligence was the cause of loss. There is evidence to the effect that plaintiff was unable to collect from the John Degnan company, that the latter was insolvent and went into bankruptcy. Plaintiff was about to file its claim for lien and waived its right to do so by reason of the defendant's promise to pay. In these circumstances we think the defendant's contention cannot be maintained.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

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A further fold is made that the avidence to avidence to the check that plaintiff might buys embloated the amount due it from the John Degmen outpost, but neglected to do so, and aired it further appears that the defendant poid the John Degmen comment the

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The dudgment of the Sunicipal court of Chicago is

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Matchett, F. J., and bedarally, J., concer.

FREDERICK C. SOMMERS, Appellee,

VS.

DIVERSEY STORE FIXTURE COMPANY, a Corporation.

Appellant.

OF COCK COUNTY.

261 I.A. 6443

BR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of trover against the defendant. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for \$338, and the defendant appeals.

tiff and his then partner bought from defendant certain fixtures to be used by them in the conduct of a restaurant in Chicago, and on that day executed their chattel mortgage to secure the payment of \$1213 as evidenced by 42 chattel mortgage notes which came due at stated times. The fixtures were secondhand and whether there was any down payment does not appear. Afterwards plaintiff and his partner proceeded to conduct a restaurant, using the fixtures in the premises at 2771 Lincoln avenue, Chicago, and some of the notes secured by the chattel mortgage were subsequently paid. Plaintiff became the sole owner of the premises and in October, 1928, defendant forcolosed the chattel mortgage, the property being sold to the defendant at the foreclosure sale, there being no other bidders, for \$750.

A short time thereafter plaintiff served a written notice on defendant, claiming that defendant had sold property belonging to plaintiff which he used in conducting the restaurant and which was not covered by the chattel mortgage. It is to recover the value of such property that plaintiff suce.

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AN. THITXCH O'COMMEND THE SHEET OF VAN BOURT.

Flaintiff brought on wetlon of trover systast the deart vithout a fury and a fendant. There we without a fury and a full that a special content of the conte

The recent discloses that on January 26, 1828, plaintiff and his than purtuer bought from defendant certain flutures
to be used by them in the conduct of a rectaurant in Chicago, and
on that day executed their chaftel mortgage to secure the payment
of \$1813 as evidenced by 42 chartel mortgage notes which came due
et steind times. The first, we were accordinant and whether there
was any fown yeyment does not appear. Afterwards plaintiff and his
the presides at 2771 illusin avenue, Chicago, and none of the retes
secured by the chartel mortgage were subsequently paid. Plaintiff
secured his sole owner of the premises and in Cotober, 1928, defendent
foreclosed the chartel mortgage, the property being sold to the de-

A short time thereafter plaintiff served a writion notice on defendant, chaiding that defendant had not property belonging to plaintiff which he wend in confecting the restaurant and which was not covered by the chattel mortgage. It is to you cover the value of ouch property that plaintiff suce.

Plaintiff's evidence is to the effect that the property which he had in the restaurant, and which defendant sold in the forecleaure proceeding, and which was not covered by the mortgage, consisted of linoleum, cigars, dishes, cooking utensils, fan, electric sign, silverware, plumbing work, electric fixtures and wiring. There is no evidence as to the value of this property.

The defendant's osition is that all of the property defendant used in his restaurant at 2771 Lincoln avenue was covered by the chattel mortgage even though some of it had not been purchased by plaintiff from defendant, and in support of this contention relies upon a provision in the chattel mortgage which/as follows:

"Equipment and tools contained in presises of the undersigned. All the above to be used by the undersigned and contained in the premises at 2771 Lincoln avenue, Chicago, Illinois." This provision is in typewriting and fellows a typewritten enumeration of the property covered by the chattel mortgage such as: One top lunch counter; one vitrolite top back counter; 12 stools; one cooler; one pie case; one battery of urns; five vitrolite top tables; five vitrolite top tables; one meat block; one table; 32 chairs; one cash register; one ice box; one steam table; one gas range; one cigar case; one sink; all plate rail partition.

In view of the fact that plaintiff was purchasing secondhand fixtures for the restaurant, as above enumerated, from defendant and was giving his chattel mortgage to secure the payment of the purchase price or a part of it, if the defendant was obtaining a mortgage not only on the property then sold by it to plaintiff, but on other property owned by plaintiff and used by him in the premises, the chattel mortgage should have been more specific so that this question would be free from doubt.

Whether it was intended by the parties that the mortgage should cover all the property in the premises, although part of it

The defendant used in his reminutant at 2771 Lincoln avenue was covered defendant used in his reminutant at 2771 Lincoln avenue was covered by the chartest morthque even through seem of this and not here purchased by the chartest of this contentian rethe pinistiff from defendant, and in apport of the undersigned. All the scove to be used by the undersigned and contents in the presithe scove to be used by the undersigned and contents in the presithe typerriting and follows a typerrities entacentian of the presiand ris case; one bettery of urns; five vitrailie top taklos; five
and register; one bettery of urns; five vitrailie top taklos; five
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In view of the fact that plaints was purchasing roundhand fixtures for the rectuurns, ha shove enusorated, from defendant and was giving his charted corlyage to secure the payment of
the purchase price or a part of it, if the defendant was obtaining
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but on other property event by plaintiff and used by him in the
grantses, the chattel mortgage should have been more specific so
that this question would be free from doubt.

approx out that neitres and before a two self-out the reverbless of the reverbless and th

hadnot been bought from the defendant, we think is uncertain. It seems unusual that the defendant, who was selling second-hand fixtures to plaintiff, was not satisfied that payment of the purchase price or a part of it would be secured by helding a chattel mortgage on the property but that he must also have the mortgage cover other property belonging to plaintiff. The mortgage apparently having been prepared by defendant, any doubt on this question should be resolved against it. We therefore held that the chattel mortgage did not cover any property owned by plaintiff which had not been purchased from the defendant.

The evidence in the record as to the value of the several pieces of property not covered by the mortgage is not in all cases as specific as it might have been, but upon a careful consideration of all the evidence in the record, we are of the opinion that the value of such property as shown by the evidence was considerably more than the smount of the finding and judgment.

We think the testimony of plaintiff as to the value of the several pieces of property was competent, and it was not necessary that it appear from the evidence that plaintiff was an expert in this respect. The evidence was sufficient to warrant the court in finding that plaintiff knew the value of the property concerning which he testified. Upon a consideration of all the evidence in the record, we think we would not be warranted in disturbing the finding and judgment as being against the manifest weight of the evidence.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

MaSchett, P. J., and McSurely, J., concur.

tures to pinintiff, was not entified out populate as the purchase to ture to purchase the control of the control of the chatter mertury as the control of the chatter nerty areas by plaintiff which has not been nerty areas by plaintiff which has not been

oral less as moneific as it wight have been, but upon à caroful escalderetion of all the evidence in the rocerd, we are of the opinion that the value of each property as shown by the delicace was considerably more than the massau of the linding and judgment.

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35086

THEODORE B. AMLE. by his next friend, HERMERT J. WELLS, Appellee.

VS.

ANN NAYLOR WELLS,

Appellant.

INTERLOCUTORY APPEAL FROM CIRCOIT COURT OF COOK COURTY.

261 I.A. 645

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

December 11, 1930, Nerbert J. Wells filed a petition in the Circuit court of Cook county stating that he was a resident of Mingston, Shode Island, and a brother of Theodore B. Wells, who resided in the village of LaGrange, Cook county, Illinois; that said Theodore had no relative in Cook county as near of kin to him as was the petitioner, and that no guardian for his personal property had been appointed; that said Theodore was past ninety years of age and that for years he had been infirm in body and in mind: that said Theodore with his wife Mary A. Wells had lived at a sanitarium at Minedale, Illinois, where he was under the care of a physician and an attendant; that Theodore and his wife lived happily together as husband and wife for about sixty-five years prior to May 31, 1930, when she died. The petition further averred that the shock of her death further impaired the physical and mental condition of Theodore Wells, and that thereafter on August 19, 1930. Ann D. Naylor, a woman between 45 and 50 years of age who had for a period of about ten years acted as nurse to Theodore, led him into a clandestine, surreptitious and pretended marriage with her at Crown Point, Indiana; that the pretended marriage by reason of the incapacity of Theodore to enter into and consummate the same was null and void; that he was incapable of taking care of his property; that Ann D. Eaylor designed to possess the same and to that end caused the supposed marriage ceremony to be performed.

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maining a begin out to be tracked the first telepart in the Viracit court of Cook county stating that he was a regisont of singeton, airede laland, and a brother of Bhasdare B. Welle, who resided in the village of bedrange, took county, lillwoist that mid as this to read to recent the Coal read or bot to death the -core fameres aid to mail-tank on this time treatlibes of any an warp their rear new distribution of the feet was past planting on a feet plant their at how when all artial none has on brook reit dust him one to that said lisosters with his wife hary A. Wella had lived at m sonituries of Minerale, Illingia, where he was sade the care of skysician and an attentuat; that Tresdore and his wit a lived house make grave orthogon books the gire has Smother as unlinger wife their day of the part of fulness for Levisyly out borings! randuct that not to hope out condition of Three and and that thereafter on August 19. 2010. Am D. Erglor, a worne between 46 and 90 years of age who had for a period of about ten years octed as nurse to Desolure, led him inm to used daily agains as become out pretonded marriage with her at Grown Folus, Ladiens, that the pretended marriage by reason of the pay some oil stamments has officered of probobil to ystercont -core old to see mained to addennate out out they has then and of han some oils assessed of bouldesh tolyall . and fail types and cassed the supresed werrlays estement to be performed.

The petitioner presented a bill of complaint, setting up these and other facts and praying that the marriage might be annualled, for an injunction, for a receiver for the property, and for other relief. An order was entered appointing the petitioner next of friend for his brother Theodore and granting leave to file the bill.

Defendant was served on December 13, 1930, and entered her appearance January 15th thereafter. February 7, 1931, she answered the bill admitting some of the facts, denying others, asserting the capacity of Theodore Wells to contract the marriage and that she was his lawful wife, and denying the equities of the bill. February 2, 1931, the next of friend filed a petition setting up the proceedings as heretofore recited and stating that Theodore Wells, under the last will and testament of his wife. Mary A. Wells, received property valued upwards of \$30,000; that he held insurance policies payable to his estate to the amount of more than \$5,000, and that his whole estate was worth more than \$35.000: that at the time of the pretended marriage Theodore B. Wells had in his bank account from \$1,000 to \$1,300; that shortly after said marriage an order was entered by the County court of DuPage county where the estate of Mary A. Wells was in the course of probate, permitting and directing payment to said Theodore of the sum of \$65 a week, which has since been paid to him; that subsequent to the filing of the bill of complaint application was made either by Theodore, or Ann Maylor on his behalf, for loan or cash settlement on the insurance policies of the sum of \$1,079 on one policy and the sum of \$4,324 on the other policy; that also subsequent to the filing of the bill, upon request of the solicitors for Ann Naylor, a legacy of \$1,000 had been paid either to Theodore or to Ann from the estate of a deceased brother of Theodore; that altogether since said marriage there had been paid

betests our teleganted on became 15, 1930, and extend bed tonescope of the later of the Property V, 1837, she en ereds the bill whitting ones Tees the Less, denying cliers, an agained and Jeanface of affect exchange to gliouse and pulities and that one wis not lasted with, one houses the weeking of the Mills Friendly Y, 25th, the sam of faber 7ther a political saledadi galdada hun bodisou exelodouen es eguibecepus esid qu gald Throdore Vells, unique the list will and trained to his wife, dai' id. Testing brosers valued upwards of \$30.000; inch te summe policies payable to his estate to the secure of men ston derov was class about his few , 200, 24 hour over id proposil egairram behinders and to emit ad ta Jant : COD. 500 Ville had to be a successful from 51,000 to \$1,000 the said all had said to frace vinued out we bereits now retro us systrace bise rette Daffege county mayre his actain of Hary A. Valls was in the course to erecond blos of desays palitable bas guilliate, possors to wire your judd at him went wants dod online , how a feet to mad will gan noise it to Jak Lyano to itle end to gaill' out as ineven ande eliber by freeders, or and ingles on his benelf; for loss or no 870, It to mue out to colutted concruent out so them it so does sele just typilog route out no tel. He to me out him yelled one sebeccumit to the Filly of the bill, upon request of the sellisof realisting and hed doo, it to gongol a , relyad and re's are To redford because a to addite out that of to arobook?

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to Theoders or Ann moneys amounting to upwards of \$7,500, which the petitioner averred had been or was about to be dissipated by ann Eaylor, and that all of the money had been procured at the instigation, suggestion and in accordance with the desires and wishes of Ann D. Maylor and in pursuance of her plan to secure for herself the property of Theodore Wells; that unless a receiver was appointed the property of Theodore Wells would be dissipated and wasted and he would be deprived of the same to his great damage. The petition prayed that a receiver might be appointed to take over, handle and conserve the property, with power to make disburgements to Theodore B. Wells as the same should be proper, and that Ann D. Naylor might be required to account to the receiver. The petition was verified by the next friend, who stated in the verification that the same was true except as to such matters as were therein stated to be upon information and belief. Neither the bill to annul the marriage nor the answer thereto was verified.

The chancellor after notice and a hearing appointed the LaGrange State Trust & Savings Bank (which was also acting as executor of the last will and testament of Eary A. Wells) receiver, and this appeal is prosecuted by defendant from that order. The order recites that the matter came on for hearing upon the petition "and from statements of councel, both for complainant and defendant, in open court," the court found that Theodore B. Wells was upwards of 90 years of age; that he was too ill and feeble to be brought into court or to be disturbed by a hearing at his residence in La Grange as to his competency to manage his affairs; that his wife, . Mary A. Wells, with whom he lived for upwards of 65 years, dood May 31, 1930; that the said Theodore B. Wells and his nurse, Ann D. Maylor, went to Crown Point, Indiana, August 19, 1930, where a license was procured and a marrage ceremony performed pronouncing

of Thee for or and assert asserting to upears of 17,500, which the partitioner arearred had been or was about to be reasoned by Ann Baylor, and that all of the money had been procured at the inparties and parties our will conscious will be neighbor our with parties t in D. Hayler and in purcuase of her plan to secure for hersqif the property of insectors wolls; bush unions a receiver was appointed the property of Theodore Wells would be discharached someth from whi as some out. In besiever of blues ad him beings Inc patition prayed that a receiver minis he supelment to take ever, handle and conserve the property, with parer to make diebur samonts to Threshore E. Welle on the start burgers to proper to that has I. Maylor sight be required to ecount to the resoiver. The pointion was woulding by the next Trions, who obated in the no question flora es se scence mas nos como est seds maisofilare were therein etated to be upon information and helief. Religar with the circula process and the conjugate and lines of life has after the contract of the cont

the hadrange State Iras & harings News (which was also noting as exactor of the hart has haring as exactor of the last will and testment of hery A. Wells) receiver, and this encest is proceeded by Asfendant from that order. The order in and this encest. The order from exactor of source I. To be defined the court I. The court family that Theodore I. Wells was symethed if yours of east the bedieved by a bearing at his residence in its intercourt or to be disturbed by a bearing at his residence in its intercourt or to be disturbed by a bearing at his residence in its draw A. Wells, with show he lived for apparent of the years, that

them man and wife; that said parties were living at LaGrange, Cook county, Illinois; that pursuant to order of court, a bill for annelment of the marr age was filed December 11, 1930, and was then pending; that Theodore B. Wells inherited from his wife, Mary A. Wells. an estate of upwards of \$30,000, and that he had insurance of \$5,000 and a legacy of \$1000; that on August 19, 1930, his property amounted to upwards of \$55.000. all of which was personal property: that since that date upwards of \$7500 of the property had been collected by Theodore Wells or by someone on his behalf; that upwards of \$6000 of this amount had been collected since the filing of the bill for annulment of the marriage; that this sum of \$6000 was composed of sums from insurance policies held on the life of Theodore Wells and of \$1000 from the estate of a deceased brother: that at the time of collecting these sums Theodore B. Wells was recolving a pension of \$60 a month and the sum of \$60 a week from the estate of his deceased wife, Mary A. Wells, on an order of the Probate court of BuPage county, Illinois; that it appeared from the statements of the solicitor for defendant in open court that the said sums of money, amounting to approximately one-fourth of all of the possessions of Theodore B. Wells had been spent: that it further appeared from facts positively alleged in the petition and from the evidence and state ents of counsel in open court that the remainder of the property of Theodore &. Wells was in danger of being dissipated, and that the petitioner was entitled to relief as prayed in the petition.

It is arged in the brief submitted in behalf of defendant that the court was without jurisdiction to appoint a receiver because it did not have jurisdiction either of the person or of the property of Theodore E. Wells; and Isle, Admr. vs. Cranby 199 Ill. 39, is cited to that point. Mowever, upon oral argument where the matter was fully presented, counsel for defendant admitted

access, liking the purposes to eries of court, a bill you amake. mont of the marrage van filed Coomber 11, 1930, and wer then pende that theeders I. Wells invested from his wife, Inty A. Wells, an estate of appearant to olive in all the parameter of the Co. and a lender of AllCO: that an August 29, 1830, 14s property accounted tail testage a labered and delice to the . 305. 301 to observe of before los mont but afregous out to opera to shrower each said souls to shower that or by second on his becalf; that appeared to ads to mail's ads could have lies cond but durame alds to 00000 aur 00000 to men wiff that toget the court of the men of 111d he will not us bled welozing sentings out; one to beengups resijone basesoch a 'to stars. out mer't didi: lo bas allow erohoos! or the allow . C. erabeen same ased initrolies to emit out to tail more means of To me add the the the welcome of the release the estate of his decembed wife, bory A. Welle, on an order of the mort berunce of tody jelectill, journ opered to grow whether sads from mage at such as to be a socially out to assemble off To sirual-ano glodomicorqui of unitanous, gonos lo same bles sul that the presentate of ... return .. 'to an love special to fin molition out at hegali: glaviflagg flows from the capacitat di and from the evidence of the chart of aumopies of the court that To remainder of the property of Theodore E. Wells was in danger of as tolige of bolitime see tendilities will fail how , be Jacob build being prayed in the setteion.

fordant that the court was without jurisdiction to appoint a recondant that court was without jurisdiction to appoint a reuniver because it did not have jurisdiction either of the versen
or of the projects of Theodore B. Wells; and lois, Adec. we. Urenby
193 Ill. 33, is sited to that point. However, usen oral argument
where the satter was fally researted, counsel for defendant adults

that the court had jurisdiction.

The controlling question in the case therefore is whether the court erred in aspeinting a receiver. There is no doubt of the fundamental rule for which defendant contends and to which she cites a number of cases; - a receiver should not be appointed except on proof of grounds showing fraud or immediate danger to the property unless it is taken into the custody of the court. It is pointed out that the bill of complaint is not verified and therefore may not be considered as proof; that it being admitted that the marriage was colebrated, everything essential to the validity of the marriage, including the capacity of the parties, would be presumed, as was held in Winter v. Dibble, 251 Ill. 200; that the competency of every person is presumed until the contrary is shown by competent evidence (People v. Spencer, 264 Ill. 124.) However, all this being conceded, we are unconvinced that the court abused its discretion in applinting a receiver under circumspances such as the record discloses. A careful reading of the bill and the answer, as well as the petition and the facts recited in the order, apparently based on admissions of counsel, has convinced us that in view of the fact that the estate of the complainant is rapidly being dissipated, the same might well be conserved by the appointment of a receiver until such time as the case should be heard upon the merits.

It was stated upon oral argument, although the same does not appear in the record, that the hearing was adjourned by the chancellor for the express purpose of allowing complainant to when be brought into court and that/it was represented to the court that this was quite impossible, the court suggested a visit to complainant by a commissioner of the court, to which proposal defendant refused to accede.

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the controlling question in the once therefore in minother the court error in augolating a receiver. Here to no fount dalide at hem absorbers discharged and of you give defensation? yelf the sis often a number of eases; - a receiver should not be - 11.14 of reach elaborat to breat galvett charact to rear no feete . Sunce out 'to aboteme and and analy at it assime extensive and has beltiter too at taiclower to like out that the belater at best the may not be considered as propis the take not real residence. eds of Influence unlityreve testardeles and spairten out fadi veliting of the marriage, the inding the engelsy of the parties. sould be presented, on was held in Winter v. Libbia. 281 111. 200; that the competency of every person is premed until the contrary is shown by computers evidence (People a. Spencer, Mid III. 124.) lowers, all this being conceded, we are amongined that the court siused ita dinoration in apprinting a receiver under circumstances ouch as the record discloses. A careful reading of the bill and the amover, as well as the pertitor and the facts recited in the order, apparently besed on adolasique of councel, has convinced us that in view of the class the cates of the complainment is rapidly being diretected, the came might well be conserved by the ad filunda onno ade un emil deut llème aprincer a le facciologge ARTERIOR AND MACH PRINTED

It was stated upon oral argument, although the same does not appear in the record, that the hearing was adjourned by the chancellar for the express purpose of allowing described to the court whom that this court and that this court and that this court the court augmented a vist to the court this was raite invertible, the court augmented a vist to defendent refused to accord.

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annear in defence of the brise or indicate any interest in the case, and the refused of the defendant to permit the actual facts as to complainant's condition to be ascertained, in our opinion speak elequently of the wisdom and necessity for the appointment of a receiver. This will hold matters in statu quountil the rights of the parties are determined by trial.

The order will be affirmed.

AFFIRMED.

O'Connor, J., concurs.

McSurely, J., dissents.

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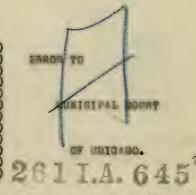
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MEMRY SHOTT, for the of HAMY ALL and JOSEPH MEZIN, doing business as wilk & ROBEN,

Defendent in Error,

METROPOLITAR LIFE INSURANCE COMPANY, a corporation, Garnishee.

Plaintiff in Error.



Opinion filed April 15, 1931

MR. FRESIDING AUNTICE WILSON delivered the opinion of the court.

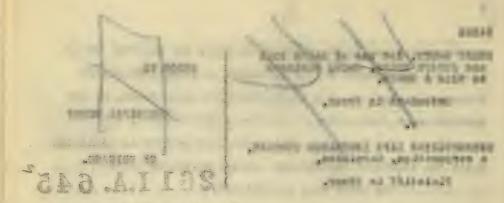
Harry Wilk and Joseph Homen, doing business as Wilk & Rosen, resovered a judgment against Henry Brott for 1212.66 on April 14, 1939. Execution was issued and returned, "So property found" November 14, 1939. On the dame day an affidavit for garnishment was filed and su mone issued to the Actropolitan Life Insurance Company and the fest Side Trust & Savings Mank, as garnishess. The Foot Side Trust & Savings Mank filed its answer admitting that it had \$19.53 and judgment was entered for the use of the plaintiff for said sum and the time to answer for the defendant Metropolitan Life Insurance Company was extended ten days.

December 5, 1929, the answer of the Setropolitan Life Insurance Company was filed denying any indebtedness to the said defendant Brott.

December 18, 1988, default was entered and judgment taken against the Netropolitan Life Insurance Sompany for \$212.66.

January 29, 1930, the Metropolitan hife Insurance Company entered its motion to vacate and judgment and filed a petition in support of the same. The patition, among other things, alleged:

That the judgment was void because Henry Brott was an employee of the plaintiff in error, was a married man, head of a family, residing with the same and employed by the garnishee on a salary basic and the plaintiff in said action



Opinion filed April 15, 1961

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Herry Fills & Rosen, reconvered a judyment against Henry Grote for 1212.85
on April 16, 1606. Accounted was include Henry Grote for 1212.85
on April 16, 1606. Accounted was include and returned, "No property found" Averaber 16, 1606. On the date of the Arithmetic for garaishmones and filed and was filled to the first of the first of the first of the filed its causes a date(s) against to the filed its causes a date(s) against for to the file filed its causes a date(s) against for cold filed and fudgment was enterpret for the detendent Motrocolisms like sun and the time to enterpret for the detendent Motrocolisms like

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densery 10, 18:0, the betropolites life Insurance Commany entered the median to recule suit indicate and filed a potition in support of the seas. The protition, emong other things, alleged:

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failed to comply with Chapter 68, Faragraph 14 of Chhill's Statutes, 1939, and to serve and deliver a copy of a demand to the employer, etc., and to serve a copy of the demand on the employer and file the demand with the cierk of court with service endorsed thereon at least twenty-four hours previous to bringing suit with the returns swomn to; that the ourmons was unlawfully issued and did not require any answer."

It is also charged in the petition that the appearance of the defendant Metropolitan Life Insurance Company was of record and that it had filed its answer, stating it was not indebted and that no motion was made to strike the answer from the files, and further that there was a judgment entered against another defendant and that there was not due to the plaintiff in said original suit the assunt of \$212.66, because of its reduction by the judgment against the co-defendant. Upon the argument before the trial court, counsel for plaintiff stated that he would not file an answer, but would treat the petition as containing facts that were true, and filed his metion to strike the petition from the files and to have the hearing treated as a demurrer to the petition, and the court so considered it. The same question was before this court in the case of Farz v. Reliable Furn. Mfs. Ga., 237 Ill. App. 400. The court in its opinion says:

"It is urged by counsel for the Furniture Company, for various reasons stated, that the court erred in not vacating the judgment of July 2, 1824, even though more than 30 days had passed after its rendition before the motion to vacate it was made. We shall only discuss one of counsel's points, namely, that the judgment is void, under the provisions of section 14 of the carnishment act, in that before the garnishee suamons was issued and served no proper desand in writing was personally served either upon fara, the employee or wage canner, or the furniture Company, the employer; and being void, as distinguished from being merely erroneous, it may be attacked at any time even after the expiration of 30 days from the date of its rendition.

We are of the opinion that the point is well taken and that enid judgment, under said act, is void, and that the court erred in not sustaining the motion of the Furniture Company to vacate it."

The case of <u>Farm</u> v. <u>Reliable Furn. Mfg. Co.</u>, <u>supra</u>, is based upon its construction of section 14 of the Garnishment Act, Cabill's Illinois Revised Statutes, which provides that, "Sefore

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the it had filed its enemer, exciting it was not indebted and these no socies who filed the factors no socies who filed files, had forther there was not in a the original suit the emount there was not in a the original suit the emount of files, because of the reduction of the argument before the trial sourt, counsel for plaintiff stated that the action of the solition as combalating facts that care thus, and files action to extrine the perils of treat to extrict the perils are treated to extract the perils are treated to extract the perils are treated to extract the perils are treated to have the hearing treated to interest in interest it. The

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the case of Fare w. Ballahie Furn. Wir. Co., surra, is

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bringing suit a demand in writing shall first be made upon the employee and the employer " " * and a copy of such demand shall be left with him and with the employer, having endorsed thereon the time of service, at least twenty-four hours previous to bringing such suit." The act also provides that a return shall be made with the clerk of the sourt, showing such service, and that any judgment randered without said demand shall be void.

From the facts set out in the petition in support of the motion to vacate the judgment, it appears that this statute was not complied with. Under the provisions of the statute the judgment was void and should have been vacated.

we have not been sided in our consideration of the cause by any briefs on behalf of the plaintiff.

The order of the Municipal Sourt denying the motion for leave to file a petition and set acide the judgment against the garnishee, Actropolitan Life Insurance Soupany, is reversed and the cause is remanded to the Municipal Sourt with directions to vacate said judgment entered December 18, 1988.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL AND FRIEND, JJ. CONCUR.

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THE RESIDENCE OF THE PARTY OF T 34584 JOSEPH C. RECHER, doing musiness under the name and style of LAKES & COMPREY.

(Plaintiff) Appellant.

APPUAL PHOL

MUNICIPAL COUNT

V.

or chicken.

ANTON STAKENAS and ANELE STAKENAS. (Defendants) Appellees.

Opinion filed April 15, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This was an action brought by Encher, the plaintiff, doing business under the name and style of Lakes & Company against the defendants, Anton Stakenes and Anels Stakenes. his wife, to recover the sum of \$375, claimed to be due for services rendered as a broker in procuring a purchaser for certain real estate owned by the defendants.

From the facts it appears that on January 31, 1936, a contract was entered into between Stakenas and his wife and one Joseph Lechavicz and his wife, under which the parties agreed to exchange properties. Among other provisions in the agreement was the following:

"It is further mutually agreed that brokerage feen or commissions shall be paid to Zig Lakes & Co., 4375.00 by first party and \$500.00 by second party, by the respective parties hereto as heretofore agreed between them and said broker."

Upon the trial of the cause, the court permitted parol evidence on the part of the defendents for the purpose of showing the agreement between the plaintiff and the defendants at the time the contract was entered into.

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From the facts it opposes that on Jenuary 71,1928, a contract was an interest to between Otenson and his wife and one Jesuph Lookevier and his wife, under which the partice agreed to exchange properties. Among other provintens in the agreement was the following:

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Upon the trial of the defendants for the puritied gazal evidence on the purpose of shortist the first the plaintist and the desirance of feminal the time the contract was entered into.

But one point is involved upon this appeal,
namely, that the court erred in admitting this testimeny.

It is insisted on behalf of the plaintiff that as the
contract was a written contract, oral testimeny was inadmissible for explaining or changing its terms, and we
are referred to the case of <u>Merchants Loan & Trust Co.</u> v.

Manuach, 228 Ill. App. 67, holding that where a third person,
not a party to a contract made for his benefit, seeks to
enforce it, he is bound by the rule that parel evidence
is not admissible. Such, however, is not the case here.

not
The contract was made for the benefit of plaintiff, but was
between two parties seeking the exchange of properties.

This court in the case of <u>Volandus</u> v. <u>Eclencksis</u>.

227 Ill. App. 355, had occasion to pass on this question under the same set of facts. The court in its opinion on page 358, said:

"The plaintiff was not a party to the contract introduced in evidence. If he has a valid claim against the defendant, it is by virtue of an entirely different agreement which exists between these two. It may be that the written contract between Melaucksis, Vaitonis and Juzenas is some evidence of what the agreement was between the plaintiff and Melaucksis. It tends to show that the agreement was that Melaucksis was to pay the plaintiff \$300, but it does not show anything, one way or the other, as to when that payment was to be made, whether it was to be made on the consummation of the contract or whenever the exchange was effected, or whether it was to be when the exchange was consummated. Clearly, evidence was admissible to establish the other terms of the agreement, and it cannot be said that such evidence has the effect of varying the terms of a written contract."

In the case at bar the contract, if any, between the plaintiff and the defendants was an oral agreement. It was competent as evidence in support of plaintiff's position, but for no other purpose. The court properly admitted perol evidence for the purpose of showing what the oral contract

it is included as beaulf of the limitiff that as the contract was a written contract, oral testimony san in
le is revered to the case of "strain toom & Truck Co. v.

1. This, whit is to contract code for his benefit, useks to cafores it, he is beaud by the rule that parel syldence is not adminable. Such, however, is not his case here.

The contract sea under for the benefit of plaintiff, but was the contract sea under the benefit of plaintiff, but was

This court in the same of <u>Volendus</u> v. <u>Melosoksis.</u> 227 Ill. App. 366, had coccation to peas on this question under the same set of facts. The court is its opinion on page 538,

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In the case of har the contract, if any, between

the sequetant as evidence in support of plaintiff's position,
but for as other surrosse. The court properly admitted parol
cvidence for the parence of showing what the orel contract

was between the plaintiff and the defendants.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

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SERVICE STATE BANK,

Appellant,

V.

MAX KULWINSKY,

Appellee.

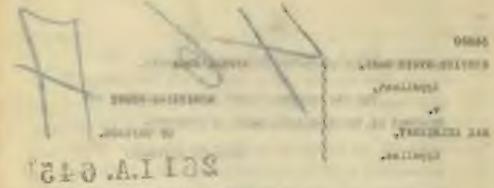


Opinion filed April 15, 1931

ak. FREMINISC JUSTICE TIMES delivered the spinion of the court.

The plaintiff, vervice State mank, recovered a judgment upon a promissory note for \$597 together with costs against Max Kulwinsky in the Junicipal Court of Chicago. Execution was issued and a dector's schedule was filed. Thereupon summons in ganrishment issued against Pioneer Trust & Savings mank, Sidney Nosenweig, Fauline Meuller, S. Soldstein, Edward C. Resenvald, P. Middle and Charles Hyman. The individuals named as the garnishment proceeding we based upon the theory that the rents owing by them were due and payable by them to Eulwinsky. Later on the Figurer Trust & Savings mank, a corporation, filed its intervening petition claiming the rents due in the hands of the individual garnishees.

Savings bank, testified that the building was occupied by the tenants; that on or about February 7, 1830, the building and real estate upon which it was situated was conveyed to the Fioneer Trust & Cavings sank, as trustee, by Eulwinsky and his wife, to secure a loan in the amount of 13,867, and that the interest of anna Julwinsky was assigned by her to R. H. Lovett, vice president of said bank. This assignment by Anna Eulwinsky, the sife, conveyed to the Fioneer Trust & Savings bank, the rents issues and profits from said building as accurity for the loan, but reserved to herself the right to collect the rents and manage the



Opinion filed April 15, 1931

The claimist, were in the content of the mith content and ten upon a promiseour note for find? together with content action the fact land for the fact of this one. Execution the installation in the fact of this one is the content of this in the fact of the fact in the fact in the fact the fact the fact the fact the fact the correcting we have to intent, that the reason that the content of the times of the fact of the reason the tent the tree of the later and the times of the three contents and the fact the fact of the fact the standard of the later and content the tent of the heids of the later and content the fact of the later.

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property with the understanding that the surplus was to be turned over to the Pioneer Trust & Savings Sank.

The trust deed in question and the assignment of the rent were introduced in evidence and marked intervening petitioner's exhibits 1 and 2. These instruments are controlling in the decision of this case for the purpose of showing the property right of the Pioneer Trust & Mavings Mank in the rents derived from the building in question and for the purpose of showing that such rents in the hands of the tenants properly belonged to the Tioneer Trust & Savin a Benk. Neither of these instruments appear in the record. In view of the fact that the position of the Pioneer Trust & Savings mak, as intervening claimant, is based upon these instruments, it was essential that they be made a part of the record and properly presented to this court. Their absence leaves only the testimony of the officers of the bank ag to their contents and, from this testimony, we are of the opinion that the trial court properly found that the rents had been conveyed to the intervening claimant, Pioneer Trust & Savings Bank. In the absence of these instruments, every intendment must be found as to the correctness of the trial court she had an opportunity of reading and considering these documents.

It appears from the record that the trust deed and the assignment of rents was given prior to the obtaining of the judgment by the plaintiff against Mulwinsky in the Municipal Court. It is urged that there was no notice of the assignment placed on record, but this would not benefit the plaintiff, but might be a projection to the tenantin case they continued to pay rent to another person, other than the the sasignee of the rents.

We see no reason for disturbing the judgment of the Municipal Court.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

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assignment of reats was given prior to the obtaining of the judgment by the plaintiff ancient indexent in the dunicipal fourt. It is urged that there was no notice of the configurant placed on record, but this would not benefit the plaintiff, but alpht be a prosection to the tenants in case they configured to pay rest to enother person, other than the the sentings of the reats.

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ATTRICATED TRANSPORT

JULIUS OLF,

Appellee,

Appellee,

MUNICIPAL GOURT

OF CHICAGO.

Appellant.

Appellant.

2611.A.645

Opinion filed April 15, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Julius Olf brought his action against the defendant, Apfelbaum & Stern, Inc., in the Municipal Court for breach of contract for services, and recovered a judgment for the sum of \$840, from which judgment an appeal is brought to this court. A jury was waived and the cause was heard by the court.

The action is based upon a written contract under which the defendant agreed to employ the plaintiff from December 17, 1928, to December 14, 1939, at a salary of \$135 per week, and containing a clause which provided that the plaintiff "agrees to render services to the entire satisfaction" of the defendant. The written contract is short and the only reference therein made as to the services to be performed by the plaintiff is that he was engaged as a pattern maker.

Plaintiff in his testimony stated that the nature of his work was not exactly laid out; that the dresses were made by a designer and sent to him and from them he made the patterns. We stated that he had been a pattern maker for 30 years; that he immediately started to work under his agreement and continued to work for the defendant during January, February, march, April, May and June; that on one Saturday in June he had a conversation with Apfelbaum, an officer of the defendant company, at which time he, Apfelbaum, stated that he was sorry that he would have to make some changes in the business on account of business conditions. Flaintiff was discharged on or about July 1, 1929.

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Opinion filed April 15, 1931

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Julius oil brought his action against the defendant. agralians & stern, in the municipal hours for bronch of contract for services, and recovered a judgment for the sum of 1845, from which judgment an expend is brought to this cours. A ture can write a and the cause was heard by the court.

The motion is beend onen a written contract under which defeated agreed to eating the pilateil? From measure 25, 1816, printered has no a relate of this per news, and added to and drive values of angene" blistabile and sond Authorety white securit a al sperioco messire adi . Suchembed ade lo funiscolaiste existe ad es short and the only reference therein sade as to the services to be externed by the plaintiff is the the mar marcad as a pattern maker.

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whether or not under the clause, plaintiff agrees "to render services to the entire satisfaction" of the defendant, the defendant, as employer, had a right to discharge the plaintiff without assigning any cause. It is also insisted that while there might be an exception to the rule, as where the sischarge is brought about by fraud on the part of the employer, atili this must be pleaded affirmatively by the employee in an action for arengful discharge. The action, however, is one of the fourth class in the municipal Court and the municipal Court act does not require the same exactitude and certainty as to the pleadings as would be required in actions of the first class or in cases in the Circuit Court. The rule in regard to the right of cancellation of contracts of this kind by the employer is stated in the case of Bishop v. Bloomington Canning Co., 307 Ill. 179, as follows:

"In discussing contracts of this nature with reference to the cancellation of the same, it is stated in 12 Corpus Juris, sec. 768, p. 675: 'Contracts in which one party agrees to perform to the satisfaction of the other are ordinarily divided into two classes: (1% where fancy, taste, sensibility or judgment are involved; and (2) where the question is merely one of operative fitness or mechanical utility. In contracts involving matters of fancy, taste or judgment, when one party agrees to perform to the antisfaction of the other he renders the other party the sole judge of his satisfaction without regard to the justice or reasonableness of his decision, and a court or jury cannot say that such party should have been satisfied where he asserts that he is not.'

From the authorities cited by counsel for both parties it seems quite clear that in construing contracts of this kind each particular case must rest on the contract as well as on the facts shown with reference thereto.

Under this decision it is apparent that it became a question for the trial court as to whether the contract in question came under enumer-

spiritual states that in mertyle and the hips were tight on made, - the sleaves vers tight on me tyle and the hips were tight on the could not use him.

The testimony stranglainess is corrected to a certain extent by that of Steinberg, as easieyed of the company.

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product or attack to a grant make providing at 197 to some

the fourn sith reference thereto,"

eds for melsteen a comment that it became a question for the

v. Bloomington Capping So., supra. The trial court swidently found that it was not a contract where fancy, taste, sensibility or judgment was involved and that, therefore, the defendant had the right to show that he was not discharged because of dissatisfaction on the part of the defendant, but that the real reason was because of a falling off of the business of the defendant corporation. This court had occasion to pass upon this question in the case of Trevellick v. restern Vaudeville Languers Assn., 337 Ill. app. 493. In the Trevellick case the trial court directed a verdict in favor of the defendant at the close of all the swidence and the cause was reversed on the round that there was a question of fact which the plaintiff had a right to have a jury pass upon.

before us on the part of the plaintiff tending to support his sociation that his discharge was not because of discatisfaction on the part of the defendant corporation, but for a different reason. Under such circumstances this court is bound by the finding of the trial court which had an opportunity of sociang the witnesses and bearing their testimony. It cannot be said that the finding of the trial court is manifestly against the weight of the evidence. Buch being the rule it becomes the duty of this court to affire the judgment of the trial court.

For the reasons stated in this opinion, the judgment of the Bunicipal Court is affirmed.

JUDGWERT AFFIREUD.

HEBEL AND FRIEND, JJ. CONCUR.

thet it was not n construct where truey, there, neutility or judgment was involved and these, therefore, the infermions had the raibs to show to involved and these was appearing a management of the trial court directed a results to devou of the defendent at the close of the seldence and the cause was surrected a result the seldence and the plaintiff had a sight to have a justy seas upon.

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before as an the part of the plaintiff tending to support his continue the continue that the discrimings was not because of discrimination on the part of the defendant anti-continue, but for a different remain. Under court of the discriming of the stirl court and the discriming of the stirl court their that the district or acceptable the district of the their the trial court their factions. It cannot be eath that the finding of the trial court is munifically against the which of the colleges. Such being the colleges it became the desire to affire the first of the stirl court to affire the judgment of the

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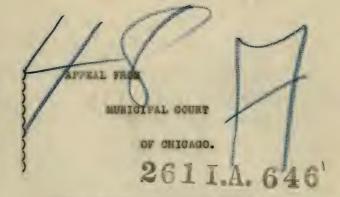
ALBERT J. TERWELL,

Appellant,

V.

ORRIN EGELAND.

Appellee.



Opinion filed April 15, 1931

MR. FRESIDING JUSTICE TILEON delivered the opinion of the court.

Flaintiff, Albert J. Terwell, brought his action in assumpsit in the Municipal Court of Chicago against Helens M. Ageland, Olaf Egeland, Crrin Egeland and Martin J. Funk to recover money collected by them as rent for certain premises situated at 4246 North Tripp avenue, Chicago. The cause was dismissed as to the defendants Helens M. Egeland, Olaf Egeland and Martin J. Funk and the cause proceeded as against Orrin Egeland, as sole defendant. The cause was heard by the court without a jury and resulted in a finding in favor of the defendant, and a judgment upon the finding, from which judgment this appeal has been taken.

From the facts it appears that the premises known as 4246 North Tripp avenue, Chicago, in the year 1227, belonged to Laura Curnow and William Curnow, husband and wife.

June 3, A. D. 1927, Leura and William Curnow, husband and wife, executed their deed to said premises to one William G. Webster.

June 4, 1927, Webster executed and delivered his deed to said premises to Laura Surnow, which was not recorded until March 6, 1930.

February 11, 1930, #11liam G. **ebster issued a second deed to the plaintiff in this cause, Albert J. Ferrell, which was filed of record February 13, 1930.



Opinion filed April 15, 1931

MH. FMETIMEN, JUSTES FILBON GOLIFFEED the spirkon of

sesuapeit in the Feminipal Court of Chicago Spainst Helena M. Egaland, Claf Egaland, Crain Michael Court of Chicago Spainst Helena M. Egaland, Claf Egaland, Crain Michael and for serbain premises situated at 4246 Worth Tripp avenue, Chicago. The second set dismissed us to the forth Tripp avenue, Chicago. The second set dismissed us to the finite of t

from the facts it appears the premises known as 4346 North Fripp avenue, Chicago, in the year 1887, belonged to layer former and William Curner, bushand and wife.

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to unid premions to Laura Curnow, which was not recorded until

February 11, 1959, Millem G. Pebater insued a separal deed to the glaintiff in this course, Mibert J. Perroll, which was

January 1927, Laura Curnow left the premises at 4346 North Tripp avenue, and from that time on the premises were continuously rented to tenants and the rents collected by Orrin Egeland, the defendant, as agent for Laura Curnow.

laura Curnow testified that Egeland had been taking care of the property and collecting the rents for her as her agent. Some objection was made as to the competency of the proof of agency, but we do not believe the objection was well taken.

but an affidavit was introduced in evidence showing that the original deed of February 11, 1930, from rebster to plaintiff was lost and a certified copy was offered and received in evidence. The description in the deed does not correspond with the other deeds insevidence, nor does it locate the property in the correct section and, if it were not for the street number shown in the deed, the property could not be located by the instrument. No other evidence was offered on behalf of the plaintiff who stood upon his title of record.

The deed from Laura Jurnow and her husband to William G. Webster, bearing date of June 3, 1927, was introduced in evidence, together with the deed from Webster back to her, dated June 4, 1927.

There is nothing in the record showing that the plaintiff made any inquiry of the tenants on the premises as to their rights, nor to whom they were paying rent, nor from whom they leased the premises occupied by them.

The evident purpose of the transfer of Laura Curnow and her husband to webster and from webster back to her, was to place the title in her, and the temporary title in Webster was evidently that of trustee, for the sole purpose of clearing the chain of title.

The consideration named in the deed from Rebster to Terwell is given as \$10 and other good and valuable consideration. There is no testimony in the record as to what the real, if any, consideration was.

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The consideration mant in the deed from sentent to remain and the rest. if any, There is no testinosy in the rooms so to what the real, if any,

We believe the trial court properly found in favor of the defendant. The rule in this state appears to be clear that the occupation of premises by a tenant amounts to notice to a purchaser of rights of which he, the purchaser, should apprise himself. Possession by the owner would defeat a deed, even though the owner was occupying under an unrecorded deed of conveyance. Occupation by the tenant of an owner under an unrecorded deed, also amounts to constructive notice to a purchaser. This occupation puts the burden upon the purchaser of making inquiry as to the rights of the tenant and the landlord under whom the tenant holds. Mallagher v. Northrup, 215 Ill. 563; German-American Bank v. Martin, 377 Ill. 629; Atmood v. C. M. & St. P. Ry. So., 313 Ill. 58. In any event, we can see no right of action against the defendant in this case. He was acting as an agent for a disclosed principal; he made no claim to the property himself, but collected the rents for the landlord and the owner of the premises, Laura Curnow. It is not a case of undisclosed principal. Moreover, the plaintiff had no dealings with him, under which plaintiff could claim that he considered him the principal in the cause.

The action was heard by the court without a jury and it is presumed that only such evidence as was material was considered by the court. Consequently, there is no force in the argument that certain evidence was improperly admitted. There was sufficient competent evidence upon which the court could enter its finding and judgment. We find no reversible error in the proceeding, and, therefore, the judgment of the Municipal Court is affirmed.

JUDGHENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

Lie invadi sed marketin sana ing a mare ana in ises confidence of the life. At The role in this state appears to be elent that the the adverse a st ention of commune thems a gd maximore to not the of rights of third has the communer, should negate be added, by rease the contract a deed, seek a factor thank the contract and/suprace contemporary to hash between an asless pullyques also by channel of he seems believe an envested and, the family to party of the arty and you was all constant of the belief without and course and to ording all as all yearsnot unities to entities of the course one the Manifest order about the Cascol Calley of Military vs. Southfellow tio til, and personal and a leading and the till and tracks TO BE A TRUE OF THE THE THE BE TO START, OR AND DOE NO arty of minic at whom he illegislates Shoulewill it toll Sange as no nearly of the president, lead to but it to not a vist of building where and do by control of the state of the blue water him water person with

The Motion was the court mithout a jury and it in the argument that it is no created in the argument that it is not tree was sufficient to the court in the first state and subject on the finding and judgment. We that ou reversible error in the proceeding, and there ore, the judgment of the Municipal Court is affirmed.

CHARLES RESIDENT

AMBROD .S. . SERERE CHA ADMINE.

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THE FOREMAN TRUST AND SAVINGS BANK, Administrator of the Estate of Ralph Bushka, Decembed,

Appellee,

V.

SOUTH SUBBURBAN BOTOR GOACH COMPANY, a Copporation,

Appellant.

AFFEAL PROM

SUPERIOR COURT

COOK COUNTY.

261 I.A. 646²

Opinion filed April 15, 1932

The Foresen Trust and Savings Benk, as administrator of the estate of Ralph Bushka, deceased, brought suit in the Superior Court of Cook County against defendant to recover damages resulting from an accident which occurred on January 9, 1938, when one of the defendant's busses ran into Ralph Yushka causing injuries to him which resulted in his death. Trial was had by jury resulting in a verdict in favor of plaintiff for \$5,000 upon which the court entered judgment.

The declaration originally consisted of three counts, the third of which, alleging wilfulness and wantoness on the part of defendant, was withdrawn at the close of plaintiff's case. The first of the remaining counts charged defendant with negligence in the management and operation of its bus; the second count alleged that while plaintiff's intestate, in the exercise of due care, was walking on Page Avenue in the City of Harvey, at or near the intersection of 153rd street, defendant negligently drove, managed and operated its motor bus at a rate of speed such greater than was consistent with the safety of persons upon the street, to-wit, at the rate of twenty-five miles per hour. To these counts the defendant pleaded the general issue.

The essential facts disclose that on the night of the

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The ferminal sand salph Tunkka Caucian lajurion to him which remulant is his fasth. Trial was had by jury resulting in a collision to occur.

The declaration originally consisted of three counts, the third of which, whiching which homes and sentences on the part of defendant, was withdraws at the close of philatiff's case. The first of the remaining counts charged defendant with negligence in that while philatiff's intention, in the creation of due care, no that while philatiff's intention, in the creation of due care, no walking on face december the fit of the creat, the face and counts of little creat, defendant negligently drown, managed and counts the intention of sealer than no consistent with the malety of mersons upon the street, to-mit, at the rate of b enty-lies alles per hour. To whose counts the defendant

and to design the disclose that on the might of the

accident defendant was driving its bus in a southerly direction on Page Avenue in the City of Harvey and the accident occurred between 153rd and 154th streets; that the north part of this block on the east side of Page Avenue was vacant and there was a well travelled diagonal path extending across the corner of this lot from the northeast to the southwest coming into Page Avenue about 150 feet south of 153rd street; that there was no sidewalk on the east side of Page avenue, but there was one on the other side of the street; that about ten o'clock of the evening in question Ralph Yushka, plaintiff's intestate, a man fifty-one years of age, was walking southwest along this pathway to the point where it intersects Page Avenue and then diagonally across the street, evidently intending to continue south along this walk on the west side of Page Avenue; that when he had almost reached the curb on the west side of the street he was struck by defendant's bus and instantly killed.

that he lived about two blocks from the place of the accident and was proceeding on his way home from work, walking north on the west side of Page avenue; that he saw Yushka walking southwest along the path referred to; that he saw the bus coming from the north, being driven at a rather rapid rate of speed over the icy pavement; that the bus passed Collins just before he got to 153rd street; that after the bus had passed him he heard the sound of the horn and turned around; that Yushka had passed in front of the bus, as it appeared to the witness, and was just getting up to the curb when the bus turned or swayed to the right or west coming almost to the curb, skidded and stopped in an east and west position across the street with its front end pointing either directly west or a little to the northwest.

Three Wojoiechowski children, Henry twelve, Josephine sixteen and Rose fifteen, testified that their father and mother

Salter R. Collins, we those for plaintif, testified that he lived about two blocks from the place of the socident and have he willing north on the worth and lay on his any home from nork, walking north on the worth patch referred to that he saw the coming from the north, buing without at a mabour repid rete of apach over the low journals that the bund of that Tuchka had passed the sound of the bune, as it appeared to the without of that burn the bun to the without and read pasted to the without to the right of west position across the bune shidned and everyed to has right of west position across the curb, with its from and pointing althout directly west or a little to the

Three Toleshought children, Henry breive, Josephine stateen and lose filtern, techtiled that their father and mother

were away from home at the time of the secident and they were looking out of the front window awaiting their return. Their testimony is substantially alike. They testified that Yushka was crossing the street from the east to the west in a diagonal southwesterly direction; that he was running at first and then walked rapidly, staggering "a little bit"; that he passed in front of the bus and wasstruck four or five feet from the west curb. Home of the children could estimate the speed of the bus, and all of them testified that its head lights and lights inside the bus were burning brightly; that just prior to the accident the horn of the bus sounded and the bus turned to the left and that Yushka was struck by the right front bumper of the bus and thrown near the curb.

On behalf of defendant Hans Fitschen testified that he was walking home at the time of the accident, proceeding north on Page Avenue between 153rd and 154th streets on the west side of the street; that he first saw the bus coming from the north at about 148th street, four or five blocks north; that it had two head lights and a couple of green lights on top of the bus and the whole body of the bus was lit up inside; that he saw another man, presumably Yushka, on the east side of Page Avenue "walking kind of staggery like in the road," running a little and walking rapidly as he crossed; that as soon as the witness got past Yushka he paid no further attention to him; that the next thing to attract his attention was the squeeking of the brakes and the sounding of the horn; that he thereupon looked around and seeing the bus standing there went back: that he saw the man lying on the street behind the bus, with the bus standing crossways on the street with the front end facing west pretty close to the curb; that he did not see anybody else on the west side of the street and no one passed him soing in either direction.

Fred K. Hassfeld testified on behalf of defendant that he was the driver of the bus when the accident occurred; that Page rand any from home at the time of the serident and they were looking out of the front windows emilting chair return. Their testimany in that

the seat from the east to the seat in a disposal south-sectorly direction; little bit*; that he passed in front of the bus and resident four on five feet from the west ough. Home of the children sould satimate the appeal of the bus, and all of them testified that its head lights the need of the bus sectors the first to the the need the bus seconded and the bus turned to the the need to the first out the sounded and the bus turned to the the residual sectors of the seconded and the bus turned to the the residual sectors of the seconded and the bus turned to the colors.

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on order hardespery attentions and he made our to read granting are ady to ohis year off no adverse offici has brill nearled someth and double two de not not need and and party and the series of todd itsorts street, four or five blooks north; that it had ten bush lights oud and to whose alone and has and and to got no other north to alcune a be we will up trates; she is an anashar mes or esqualty Muchia, off at add yrogants to ball paidler" consul upr tio shis toro and no padd ibrosors ad an vibiumt meidiam bun citali a mainur ". boor no the situation to the middle be paid to the situation and the man accompanies him; that the next thing to attored his attackion one the equalizabadeal necessed od tade tared eds to makenee and has sensed ads to cround and sector that but standing there went head; that he may the man avamance antiquete out and drive and and builded drawns and so galy. on the atreet with the front and facing rest pretty close to the ourb; but decree and be obta dean out no sais viceives see ton all of dans no diseast near to make . mid bear of con-

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Avenue is about forty feet wide between 153rd and 154thstreets and had a double car track in the middle of the street; that there was a brick pavement between the car tracks and cement pavement on both sides of the track; that the roadway was hard, crusted with snow and ice and very slippery; that he was driving along the west or right hand of the street; that the road was rutty on both sides where vehicles had found it easiest to go through, close to the curb; that his head lights were burning brightly and the green marker lights and dome lights inside the bus were also lit; that his head lights were very bright and he could see half the width of the street for a considerable distance ahead probably half a block; that the first thing he knew Yushka crossed in front of him diagonally in a southwesterly direction; that he first saw him about five feet in front of the bus and two feet to the left; that the first thing he did was to blow his horn and put on his brakes; that Yushka was trying to go across in front of the bus when the witness turned to the right not more than one foot, then turned to the left, applied his brakes and finally stopped the bus beyond the point where Yushka was struck; that when the bus came to a stop it was facing west with the rear and toward the east.

that Yushka "staggered" as he crossed the street it was sought to show that he was intoxicated, but there is no direct evidence to sustain the contention and the suggestion of intoxication is refuted by the testimony of one John Metz, an undertaker and reserve police officer in the Sity of Narvey, who was called to the scene of the accident immediately after it happened, made a close examination of the deceased to determine whether he was still alive, and testified that he did not detect any odor or other evidence of liquor. Considering the crusty and loy condition of the street with ruts worn on both sides of the car track by the passing traffic, it is not unlikely that the

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are appreciable for build opposed this yest great finds at assert are gradf dealy leaven's out to albita rolf at Storey you sideal a had died no demone the one trucks of constant converse property sides of the track; that randray was bord, ornered with anos and Adult to see and posts parried now ad four promptio year had not water makin that me grave one have all last present all to head food present at some , comment on at position for the basis and section attill torion cores off him tilthing paleties over attill had all and it bearies for fall opin the and the second eer ever bright and he could see him the the tribe of the a send arrivable distance wheel property built a mode; that the care's whing he tran Yushka aroseed in front of him diagonally in a southseaterly direction; that he time our him stone five fast in front new hip ad unide total odd teds (thei odd od teol ord bas and odd to . of galyst see aldeet that tenders als no tue has mod als void of denit eds of beares earns is and mede and and to short at course on ners mere than one fort, then taxons to the Laft, and Lak big broken and finally stopped the bue beyond the point chora Yushka was etruck; the chen the bus come to a city it was facing your sust with the ATTRACT AND ADDRESS.

the factors and the sequentians organists to several minerage that for teach a sequent to show that he was intended, but there is no direct evidence to anothin the contention and the suggestion of intententian is refuted by: the teatheony of one John Sets, an undertaker and reserve police officer in the City of Servey, who was called to the scene of the accident is about it harmoned, made a close examination of the derected to determine the chartest of determine the county and the description of the derected detect any odor or educate vith rate were on both sides of the energy and toy condition of the atract with rate were on both sides of the earlies by the passing tracted with rate were on both sides of the correct or track by the passing traction, it is not unitedly that the

appearance of staggering was due to the fact that Yushka picked his way over the low mayerent as he hurried across.

It is conceded that the bus was well lighted and that the deceased probably saw it approaching at a considerable distance. However, when he started to cross the street he apparently thought the bus was a sufficient distance away to give him ample opportunity to cross the street in safety, and his judgment in this regard is corroborated by some of the witnesses who testified that he had passed in front of the bus and reached a position of safety when the bus swerved to the right and struck him. It is urged by plaintiff that the driver was negligent in proceeding at an excessive rate of speed upon the loy pavement and in turning the bus to the right out of the line of travel after Yushka had already passed in front of it. The liability of defendant rests largely upon these close questions of fact. Collins testified that the bus swerved to the right when. as it appeared to him. Yushka had already reached the curb, and Hassfeld, the driver, correborated this testimony by admitting that he turned to the right, but stated that he turned only about one foot. It appears reasonably clear from the evidence that there was a sudden turn toward the deceased just before he was struck and that he was struck by the extreme right front part of the bus. The question of degree and whether this turn was the proximate cause of the accident were questions of fact for the jury to determine.

It is undoubtedly the duty of this court to determine whether or not the verdict is justified by the evidence, but we will not disturb the verdict on a question of fact unless we can say from an exemination of the record that the verdict is clearly and manifestly against the weight of the evidence. The jury heard the witnesses and had an opportunity to determine their credibility and reliability by recognized tests submitted by the instructions of the court, and upon a close question this court will not substitute its

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teds has headyll flow and and and tode behouse at the the feeemand probably new it a promobing of a commiderable distance. CONTRACT, then he abstract to excess the edges he expensely thought william to the self by the self-bear and the sel to expect the expect in swings, and his pointed in this source to and od feds belilions adventioned ads. To eace yo between two ods new (Tales le Bolison a bedryer bee out the trout of became had tribulate ye began at si .mid souts had tout that the bevers and boses to earr eviscous as is anticoppus at issactions are revist and and the loy pavenent and in turning the last to the right out of. the line of travel ofter Younge had adressy years to trave at it. The Hability of defendant trate Largely upon these close sucrticas of fact, volling tentified that the bus secred to the right chem. on it appears to him, fashin had altroit meaded the root, and Bossfald, the driver, correberated thie tentiment by admitting that he turned to the right, and etuted that he turned only about one fact. methus a new event suds econorive est mort ruple victures or evenes of turn toward the Mocamed just before he are struct and that it etrick by the extress right frags park of the faction of rections and to cause as mainory and asse atout aids medicate has acreed

It is undoubtedly the duty of this court to determine whether or not the verdoot is justified by the oridence, but we will not disturb the verdict on a question of fact unions on our say from an examination of the smooth that the verdict is clearly and west-factly against the weight of the sridence. The jury beard the simulation of the reliability by smoother team and had an or extunity to determine their credibility and reliability by smootherd team and but the instructions of the court, and upon a clear meetion this sourt will not submitted its

vers questions of fact for the jury to determine,

judgment for that of the jury, whose duty it was to determine the facts in the case.

Defendent complains of instructions one and eight, given on behalf of plaintiff. Instruction one, in the very form submitted by the trial court, was approved by the Supreme Court in <u>Deming</u> v. <a href="https://display.com

Instruction eight is as follows:

"You are instructed, as a matter of law, that the deceased, Walph Yushka, had the right to cross the public highway at any place in the public highway provided he used ordinary care for his own safety in so doing."

Defendant contends that the failure of the court to tell the jury that "the ordinary care referred to must be used prior to, as well as at the time of the instant of the accident", rendered the instruction erroneous. He cannot agree with this criticism. The legal proposition contained in this instruction is sound, and the provision as to ordinary care could mean nothing clae than that the deceased was bound to use ordinary care for his own safety during the whole time that he was crossing the highway.

There remains only the objection that the verdict is excessive. Tushka was but fifty-one years of age, was in good health, and left him surviving three daughters, the youngest of whom, aged sixteen, was dependent upon him for support. Under the circumstances we do not regard the verdict as at all excessive.

For the reasons stated the judgment of the Superior Court will be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

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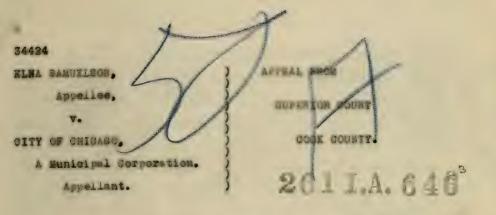
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For the reasons studed, the judgment of the Superior

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MILBOUR P.J. AND HE ALE P. CPROUN.



Opinion filed April 15, 1931

This is an action on the case, brought in the Superior Court of Coos County by Sina Semuelson, plaintiff, against the Sity of Chicago, defendant, for personal injuries sustained by her shile riding as a passenger in an automobile driven by her husband on a public highway in the City of Chicago. The jury rendered a verdict for plaintiff in the sum of \$5,000, upon which the court entered judgment. This appeal is proscented to reverse that judgment.

The declaration consists of two counts. The first count alleges that plaintiff, while a passenger in a certain automobile, was at all times in the exercise of due and ordinary care, and that the defendant negligently and carelessly permitted the street to become and remain in an unsafe and dangerous condition, in direct consequence of which plaintiff austrined injuries. The second count adopts portions of the first and alleges in addition thereto that it was the duty of defendant to exercise ordinary care and caution to maintain said highway in a reasonably safe condition; that referd nt knew or by the exercise of ordinary care could have known that said highway was in a state of disrepair, and that said unsafe and dengarous condition existed for a long period of time prior to the accident, but that defendant nevertheless negligently failed to make proper and sufficient repairs upon said highway in consequence of which plaintiff was injured.



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The essential facts are disclosed by the testimony of various witnesses. Gustave R. Samuelson, the husband of the plaintiff. testified that on May 34, 1928, the evening of the accident, he and his wife were driving toward their home in a southerly direction on State Street, in the City of Chicago; that this route took them underneath the viaduct which runs between 30th and 31st streats, crossing State Street at approximately right angles; that he was driving a thevrolet Coach with a left hand drive and his mife, the plaintiff, was sitting in the front seat to his right; that he had the usual disser lights on as required for city driving, and could discern the visduct about half a block sheed; that his lights were focused up over the pavement so he could not distinguish anything below there as he went over the top of the incline which leads down under neath the viaduct; that as he reached this incline underneath the viaduct he struck a hole in the pavement and something enapped on the car, making it impossible for him to turn the "heels. as a result of which the car run straight into one of the posts of the viaduct; that as the car hit the viaduct pillar both he and his wife slid forward, his nose was broken and hedly out and his wife's leg was broken and smashed: that this was the first time either he or his wife had driven over this part of State Street in their automobile for at least a year, and neither of them knew of the existence of the hole in the pavement; that three days after the accident he measured the hole and found that it averaged from the smallest to the despost part all the way from six to nine inches in depth, was approximately three feet wide and six feet long, and that the two front wheels of the car would fit in there nicely; that the viaduct runs east and sest across State Street, which runs in a northerly and southerly direction, and as you pass under it there is a car track running underneath it on each side of the pillars; that the mitness was travelling just to the right or west of the southbound car track, and the street slopes down gradually just before you approach the

to questions and ye bosolooth are usual faltnesses and Children of the manager of constant of the freehold and the distinct of tootified that on any Rd. 1898, the country of the centent, he and his wife tere driving downed their been an emutherly direction on State Street, in the City of Thiorys; that waves tout them undermark the vinduct which runs between dith and distance. creating fitte Street at a ground this right angles; that he mad driving a cherralet desci alth a left hand drive and his wife, the plaintiff, wer nitting in the front neer to the right; that he had in and diseast lights on as required for sity driving, and could bute artiful and took thinds from a line more specials out exceeds reality and delugated des because on on the translation of the control and the control of the co below there as he were over the top of the thoughts which issue -refine callent also before an an trust thousand and above using anch unidance has tacaves and hi sied a house of trobair and history manyed on the our, making it impossible for him to turn the checks. to esten bely to one sent telefit the trans and ability to thener a se the visite that as and out his the visite piller best he and his wife with some one probon and budly out oud bis wife's Log was broken and conduct; then this may the first time of their he works the ball of the control of the same and the control in the control of the c mobile for at levet a year, and matrior of them iner of the subjection ed suchions out rooks agob beads their thumped out at sind out to of testions and most Augerova of South Land the block will be turned ene . Atqui and andent ente or ale mont you out lie dung set that there from the and the free Long and their the two front sheets of the con round fit in these blocks that the vindust runs much and most normal State Mirror, which runs is a northerty with southerful Alteration, and so you make makes at there in your years " messelv and tails towalling out to obte doos no it drangershow gainning wes travelilar just to the right or rent of the aspidanced our tracks to be a superior of the state o the level under the viaduct. Er. Samuelson described the condition of the pavement at that point as he saw it several days after the accident by stating "there are holes under there I could hide in". He testified further that the street at that point was not very well lit up and the lights under the viaduct were cuite dim; that the pillars are approximately eight feet apart, and that he struck either the first or accord column.

The plaintiff testified that they were travelling at a moderate rate of speed, the weather was clear and the street dry, and she could see the viaduct about half a block shead; that as they approached the viaduct the lights were above the street level and as they drove down the slope they struck the hole; that she did not see the hole before the machine hit it and there was nothing there to give her warning of the existence of the hole in the street; that before they struck the hole the pavenent had been in excellent condition; that she was looking straight shead at all times and when the automobile struck the hole she was thrown forward against the dashboard with both knees and the next thing she knew some one was placing her into an automobile and taking her to the hospital.

derard Sawley, a witness for plaintiff, testified that he had followed Samuelson's automobile for about three or four blocks before the socident; that at the time of the crash he was approximately a block and a half behind them; that he could see their tail light, heard the crash, kept on going and stopped about the middle of the viaduct in order to help are. Secuelson; that when he arrived there they were both still in the car, which was practically wrapped right around the first calumn of the viaduct, and that he took both of them to a hospital. The sitness described the scene of the accident by stating that as you drive south approaching the viaduct State Street has a cement payement; that at the beginning of

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the grade where the street goes down underneath the viaduct the pavement is brick for about five or six feet north of the viaduct; that the hole into which the Samuelsons drove is located at the place just where the incline slopes down underneath the viaduct, is about five or six inches deep and runs straight down into the viaduct.

John Molen, a witness for plaintiff, testified as to the defective condition of the street at this point. He stated that he had been over State Street at the place of the accident suring the years 1987 and 1928, and was familiar with the viaduot in question; that there was a big hole between the street our track and the west curb about ten or fifteen feet north of the viaduet, approximately six inches deep and three feet wide; that the hole was placed in such a position that it would be difficult to see until you were on top of it; that the hole in the street and the condition it was in at the time of the accident was in existence for about four or five souths prior to May 1928.

Another witness for plaintiff R. B. Stephens, testified that at the time of the accident he lived at 10213 South May Street and had occasion to use State Street regularly every night and morning; that as you approach the viaduet from the north the street is quite on a slant or down grade; that there were good sized ruts where the bricks had sunk during the frosts and the thaws between the street car track and the curb, and that this condition had existed for more than six months prior to may 1928; that outside of the viaduet and about 200 feet north of it there was one street light and only two lights under the viaduet, which was about 200 feet long.

Trause, a police officer, and william Cahill, his partner, both testified that they looked at the highesty but did not see any hole there such as ar. Samuelson and other witnesses described.

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John A. Turick, also a police officer, testified that in May 1938, he was assigned to the motorcycle service and frequently passed under the viaduct in question; that there was no such hole in the pavement as described by plaintiff's witnesses; that he did remember a depression in the street about fifty feet north of the viaduct where the pavement was far from being smooth, but he could not say there were depressions six inches deep because he had never measured them. The witness testified that he always rode the car tracks underneath the viaduct and did not ride to the right of the car tracks at the place where the socident occurred.

John J. Guiltenane, another police officer called by the city, testified that there were holes underneath the viaduot but was unable to describe just where they were located and could not remember having seen any hole like the one testified to by plaintiff's witnesses.

willies Denz, also a police officer, testified on behalf of the city that he did not remember the kind of hele designated by plaintiff's witnesses, and characterized the pavement as "wavey".

On the question of damages for william A. Diffenbeugh, a physician attending the plaintiff, testified that she suffered compoundfractures of the left tibis and left fibula; that the bones were badly splintered and so broken that they had to be wired into place; that he was required to make an incision in order to bring the bones to the surface, drill holes into the bone in both ends and put a wire through and draw the fragments together, and in order to do this it was necessary for him to out through the muscles and flesh.

Flaintiff was first taken to the Roseland Community Rospital where she remained for two or three days, and then removed to the Auburn Fark Hospital, where she remained for a month, after which she was taken to her home and treated there for some time.

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Plaintiff was first to the Roseland Community

to the Auburn Fork Possitel, where she reseited for a seath, after

which she was team to her home and treated there for some time.

She testified that she suffered so much pain that she had to be taken back to the hospital again, after being removed to her home, where another operation was performed. The hospital bill was \$600 and Dr. Diffenbaugh's bill amounted to \$1,000.

is scarred from the knee down to the ankle, and that at the time of the second operation she was in the hospital about eight recks, and that she now walks with a decided limp, and suffers great pain when she is required to be on her fact for any leight of time.

As grounds for reversal defendant makes three principle contentions, namely, (1) that there was no defect in the pavement as contended for by plaintiff; (2) that the assident did not happen in the manner described by Samuelson and his wife, and (3) that plaintiff was guilty of contributory negligence.

suspersy of testimony constitutes all of the evidence in the case. Six witnesses testified for plaintiff as to the defective condition of the pavement, four of whom were entirely disinterested. Five witnesses, all police officers of the dity of Chicago, testified for defendant. There is thus presented a sharp conflict in the evidence as to the condition and extent of the defects in the pavement approaching the viaduct. The jury heard these witnesses, had an opportunity to observe their demeaner on the witness stand, and to judge their credibility by tests submitted to them under instructions of the court, and it was the function of the jury to determine this important question of fact.

by defendant that the position of the wrecked automobile immediately after the accident indicates that plaintiff was not proceeding south on the west side of State Street, but was "struddling" the rails between

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The resonance to the second contention, it is urged by defendant that the position of the proceed outsmobile immediately the resident indicates that plaintiff was not proceeding south on the seat side of state street, but was "etweeting" the relie between

the north and south bound our tracks and van head-on into the center pillar of the viaduct and that he did not collide with the accord pillar as testified to by Samuelson. In support of this contention it is pointed out that the automobile was moved to the east side of the highway instead of the rest side immediately after the accident. Mr. Samuelson gave it as his recollection that he collided with the accord pillar. Mr. Cawley, one of plaintiff's witnesses, who reached the scene of the accident shortly after it occurred, testified that he thought it was the first pillar. The first and second pillars, according to the record, are only eight feet apart. If the proximate cause of the accident was the defective condition of the street, which broke the steering mechanism of the automobile and caused Samuelson to lose control of the car and collide with the viaduct, it would be immeterial as to whether he struck the first or second pillar.

As to the third contention defendant urges that there is no evidence that plaintiff was in the exercise of due care and caution for her own safety. It is contended that the failure of plaintiff to tell her husband, who was driving, to turn on the bright lights so that she could see better as they approached the vinduct. assumted to contributory negligence on her part. It appears from the undisputed evidence that plaintiff's automobile had the regulation dim lights. according to the testimony of both manuelson and his wife. it was not necessary for them to have bright lights in order to see the viaduct. They both testified that they could see the viaduct for some distance ahead. It is plaintiff's contention that the proximate cause of the accident was not the inability to see the viaduct, but rather the striking of the hole in the public street of which they had no warning, which resulted in the breaking of the steering mechanic ism and caused the car to collide with either the first or second villar of the viaduct. It is clear from the evidence that State Street just before it approaches the viaduot all the may to within a few

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keeping a lookout straight shead as they proceeded along the highway at a moderate rate of speed. They were in a position to observe any normal condition of the street. The solient question of fact is whether or not the pavement was so defective as to suddenly and without any sarning cause them to strike a hole in the pavement and deflect the course of the automobile from the road into a portion of the viaduct. It was the duty of the jury to seteraine this question and while this court will consider the evidence, the rule is well settled that upon a close question of fact, both as to the proximate cause of the accident and of negligence and contributory negligence, the court will not disturb a verdict unless it appears from the record that the same is manifestly against the clear weight of the evidence.

It is further urged that the city had no notice, either actual or constructive, of the alleged defective condition of the street pavenent. There is no contention that the city had actual notice, and the question as to whather there was constructive notice was one of fact. If, as several of the plaintiff's witnesses testified, the hole in the pavenent existed for several months prior to the accident and the jury believed this to be a fact, notwithstanding the denial thereof by several of defendant's witnesses, it would be sufficient to give the city constructive notice.

It is finally contended that the court erred in giving instruction number twelve. This instruction apprised the jury of the allegations contained in the declaration. Defendant's only criticism is that the jury might have been misled into the belief that the court was instructing them as to the facts proven, and not those charged in the declaration. We cannot agree with this criticism. Since the jury are not permitted to take the declaration and other

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It is further usys that the city had he notice, cither artual or constructive, of the cityed defective consists on or the street paramet. There is no sontonical that the city had social notice, and the cuestion of the charter and constructive notice was one of fact. If, we seemed of the charter a constructive notice can be be a fact, and the jury buliaved this to be a fact, motal that and the surface of default of the charter is rould be shown to give the case of default it would be sufficient to give the case of default of a constructive notice.

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plendings to the jury room for consideration, it is manifestly necessary that they be charged by the court as to what the material issues are and that was the only surpose of the instruction. It has been held that a general instruction in a negligence case, outlining to the jury the milegations contained in the declaration, is not erroneous. (<u>Krieger v. A. L. & C. B. R. Co.</u>, 243 Ill. 544 Bernier v. Ill. Sent. R. S. Go., 296 Ill. 464; Billiams v. Kaslan, 242 Ill. App. 166.)

For the ressons stated the judgment of the Superior Court will be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

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Appellee,

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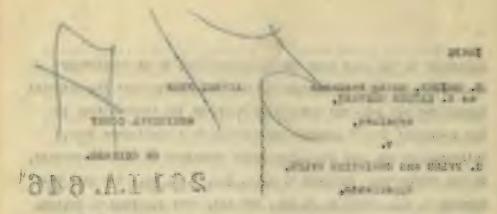
Opinion filed April 15, 1931

On January 21, 1930, plaintiff recovered a judgment by confession against defendants in the Sunicipal Court for \$1377.80.

On February 14, 1930, defendants moved to vacate said judgment and in support of their motion presented the affidavit of C. Pflug, one of the defendants. The affidavit appearing to be insufficient was eithdrawn by defendants, and on February 24, 1830, they renewed their motion, supported by an amended affidavit. This being likewise withdrawn for insufficiency, they obtained leave to file an amended petition, and on March 3, 1830, presented their third affidavit, which is designated as "an affidavit of acritorious defense". Upon consideration of the latter the court denied defendants' motion to vacate the judgment, from which order this appeal is presecuted.

The question presented for decision is whether the affidavit or petition last filed sets forth a meritorious defense to plaintiff's claim.

Eriefly stated the affidavit alleges that the consideration for the note upon which judgment was entered was the purchase and sale of an automobile from one A. E. Auston; that Buxton for the purpose of inducing affiant to purchase said automobile represented and orally warranted the same to be in good mechanical condition and running order; that Buxton well knew the automobile to contain a



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put for their formation delivered the opinion of the court.

conference against defendants in the Sunisipal Court for \$1577.83.

R of their metion presented the efficient of G. Fflux, one of the defendants. The affidavit no mering to be insufficient was witheren by defendants, and on february 24, 1930, they renewed their motion, searceful by an emended affidavit. This being likewise witheren for insufficiency, they obtained leave to file an emended drawn for insufficiency, they obtained leave to file an emended which is designated as "en affidavit, point third affidavit, consideration of the latter the neart divised defendants' action to considerant, from which or date defendants' action to

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latent defect, and that it was not in good mechanical order when the sale was made: that it was necessary for defendant to first use and operate the automobile to determine whether or not it was in good mechanical condition and that when he attempted to use the same, he discovered the said latent defect, and shortly thereafter notified Buxton that he would not accept said automobile because of its defective mechanical condition; that plaintiff by and through his agents and representatives was present at the time the representations and warranty were made by said Buxton to the defendent and well knew that defendants relied on said representations and warranty, and that both Suxton and the agent of plaintiff, one Orr, then well knew that the said automobile was not in good mechanical order and that there was a latent defect therein which could not be determined except by use and operation; that Buxton and plaintiff by and through his agent, Orr, conspired to defraud the defendants in and about the sale of said automobile and the representations and magranty made to the defendants, well knowing them to be untrue and that defendants relied thereon.

The ground upon which the court refused to vacate the judgment and held the petition defective was defendants' failure to allege with particularity the nature of the latent defect and the absence of any facts from which the court could say that the alleged warranty of plaintiff had been breached. Before the court entered its final order an opportunity was afforded defendants to still further amend their petition so as to include specific details as to the character of the latent defect, but the defendants considered their petition sufficient and elected to stand thereby.

It is urged that in order to tacate a judgment, it is only necessary for defendants to show a <u>prima facie</u> defense on the merits and that if the affidavit filed in support of the motion to vacate shows that a good defense exists, the court should set aside

and pade terror for increase here at the day of their fact of the property of has now seril as the manufacture to the defendance of the state of the book at the fi for to toldady acturated of aligometra of etarage ed less and the control of the chan he avended to use the same, bolliten redicered viscole has seeing fusici him out herevent - Fid-120 bil to become differentian him funda- you have at fall madeou neuron and disperse has an allegation than includes perfections and the annihilation of the little and the second and best transport and envrying vers units by soild furton to the defendant and rell know that defendants relies on said representations and correct, and that both Souton and the agent of ministry, our day, then sent knew that the wrods tads bas when Lebiandown been at for use olidemous blas or a later defect therein which could be determined to the determine to aid dyports has to the contract of the contrac plot eat funds but at established the Australia of heritage of the to the subsmoothe and the representations and sarranty made to the defendance, out; supplied them to or custom and what defendance exited alout Laft.

The ground upon which the court refused to vanue the junction of any frets from which the court could may that the allegat mercanty of plaintiff had now, branched, hefore the court entered its final order an expertually see afforded defendants to utili further mend their patition no us to include specific details as to the observer of the latent sefect, but the defendance considered their patition sufficient and clayed to stend thereby.

It is urged that in order to secrete a judgment, it is easy manny for defendants to show a prima facia defends on the secrete and that it is afficient filled in support of the motion to vacate about a good defends exists, the court aboutd set exide

the judgment and permit the defense to be made. Stone v. Levinson, 226 Ill. App. 343; Mahnke v. Marmon, 308 Ill. App. 153 and Board v. Fexter, 242 Ill. App. 480 are chiefly relied upon to support this contention. We concur in the principle enunciated in these decisions, but an examination thereof discloses that in each instance the affidavit alleged sufficient facts, which, if taken to be true, constituted a legal defense.

The rule is well established that an affidavit in support of a motion to vacate a judgment must clearly and unequivocally show a defense on the scrits and that facts must be atsted in the affidavit to constitute a maritorious defense and not merely facts from which it is possible to infer that such a defense exists. It was so held in Farris v. Alfred, et al., 171 Ill. App. 178, where the court in its opinion said:

"A plea of failure of consideration should show in what manner it has failed; the circumstances of the failure should be set out with as much precision as in a declaration. Honeyman v. Jarvis, 64 Ill. 366. 'The plea must state particularly in what the failure consisted.' General averagents are not sufficient.' Parks v. Holmes, 33 Ill. 528; Maidrin v. Sanks, 30 Ill. 48. Under the plea there was no specific fact averaged upon which an issue of fact could be made to submit to a jury."

The affidavit in the instant case purports/to set up a plea of failure of consideration. The court in Moneyman v. Jarvis, supra, where a like plea was interposed in a suit upon a promissory note, pointed out the reason for the rule that where failure of consideration is interposed as a defence facts must be stated upon which the plea is based. The court said:

"The latter (plea of failure of consideration) is framed upon the theory that there was originally a good or valuable consideration, but which has failed by facts subsequent. These facts comprise affirmative matters which must be particularly stated in order to apprise the plaintiff of what he is required to seet by evidence."

cases as in accord with the weight of authority, and the fact that strict pleadings are not required in the Municipal Court in cases

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Later for Mil. and. (8) are objectly solied given to support this contention. The contention when the she principle extendional in these of the affi-

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show a defense on the sorite and that facts must be atoted in the from which it is peculial to the from which it is peculial to infer that such a defence existe. It was so held in farting we alfred the its winter where the neart in its winter which

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of the fourth class, as defendents contend, does not justify dispensing with this essential requirement of any pleading by which it
is sought to vacate a judgment theretofore entered. Defendants'
third petition upon which the court's final order was entered, purported to be an affidevit of meritorious defense. The maked charge
that the automobils purchased had a latent defect and that the oral
warranty therefore failed are more conclusions of the pleader and
fail to comply with the requirements of the authorities.

reasons set forth in the petition and affidavit to set aside the judgment. The only other allegation is one of conspiracy between Buxton and plaintiff's representative, Orr, "to defraud this defendant in and about the sale of said automobile and in and about the said representations and sarranty to this defendant that said automobile was in good sechanical order and running condition" etc. To believe that this contention may effectually be disposed of by calling attention to the rule that where fraud is charged, facts must be pleaded to support the allegation, and that more conclusions of the pleader are not sufficient to support allegations of fraud. Dance v.

It is urged on behalf of plaintiff that defendant's affidavit was defective in that it contained no allegations as to a tender of compensation for the intermediate use of the automobile, and made no averments that the automobile when returned was in as good a condition as when it was received. In view of our conclusion upon the insufficiency of the affidavit upon the grounds already discussed, we deem it unnecessary to further consider these contentions.

For the reasons stated, the order of the trial court denying the action to vacate the judgment will be affirmed.

AFFIRED.

It is wrated of picintiff that the defendantia of the climater of the conclusion upon the insufficiency of the affiliant upon the grounds already discussed, we insufficiency of the affiliant upon the grounds already discussed, we

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D. L. TARJAN,
Appellee,
v.
PETER SERELAS,

Appellant.

ATPEAL PROM

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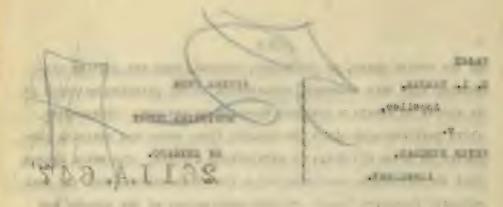
Opinion filed April 15, 1931

JULY FIGH FRIEND delivered the opinion of the court.

July was brought by attachment in the Eunicipal Court
of Chicago. The affidevit of plaintiff alleged as grounds for
attachment (1) that defendant conceals himself and stands in
defiance of an officer so that process cannot be served upon him; and
(2) that defendant is about to depart from the state with the intention of having his effects removed from the state. The return of
the attachment writ showed no property found, but service of process
was had upon the Studebaker Securities Co., a corporation, as
garnishee. Interrogatories submitted to the garnishee disclosed that
it had the sum of \$1300 belonging to defendant.

Plaintiff's statement of claim alleges an oral agreement entered into with defendant in July 1923, whereby the parties wereto share equally commissions conned by them through the sale of certain stocks, bonds and other securities; that said parties sold 4900 shares of stock of Utility Fower and Light Company and became entitled to a commission of 3,000, of which plaintiff claimed one-half or \$1500.

ment for plaintiff usen his claim for commissions in the sum of \$1250, but found the issues on the attachment against the plaintiff, quashed the attachment writ and discharged the garnishee. This appeal is prosecuted by defendant to reverse the judgment as to \$1250, and cross errors are assigned by plaintiff to reverse the judgment of the court on the attachment writ.



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order errors are assigned by plaintiff to reverse the judgeout of the

nefendant urges two grounds for reversal of the judgment for commissions; (1) that there can be no recovery because plaintiff was not registered with the Secretary of State, being a dealer, broker, solicitor or agent, offering for sale and selling securities within this state; and (2) that the evidence does not support the judgment.

appears, however, from the plaintiff's testimony, as shown by the abstract of record, that he made an oral agreement with defendant in the office of the Studebeker Securities Co., in the presence of John J. Secrley, Treasurer of the latter concern, to help defendant who was employed as salesman for the Studebaker Co., sell Utility Power and Light stock and to receive from defendant one-half of the commissions paid thereon; that plaintiff furnished to defendant the names of customers who purchased 4000 shares of this stock, and the Studebaker becurities Company, through defendant, their salesman, delivered the stock to the purchasers secured by plaintiff.

John J. Secricy testified that plaintiff and defendant met in his office; that he did not know whether plaintiff sold any of the securities, but that such an arrangement as plaintiff testified to was not unusual; that defendant sold considerable Utility Power and Light Company stock through the Studebaker Company, and before the commission was finally due and paid to defendant plaintiff onme in and "told me what he stated to be his arrangement with Mr. Serelms."

b. G. McCue testified that defendant brought plaintiff to him and introduced him as a men assisting him, Serelas, on Utility Power and hight Company stock; that they could not get any more stock from the Studebaker Company and requested the witness to let them have some of his stock; that McCue agreed to pay \$1.00 per share commission which plaintiff and defendant agreed in the witness' presence to divide between them; that a total commission of \$1800 was thus earned by the parties, \$300 of which was paid to plaintiff and the other

The Drieds contains a testinony, as stond by the appears, hearing as stond by the appears, hearing as stond by the the office of the interpretation of the interpretation of the interpretation of the latter concern, to help defendant that it deeploys as salarant for the Studenters of the Penet and Light stook and to receive from defendant pac-half of the names of this stook at the salarant of the names of this stook, and the names of the purchasers accuracy by plaintiff.

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\$900 tendered to defendant, who refused to accept it.

As against this testimony there appears only the denial of defendant that he had any agreement with plaintiff in respect to commissions.

while it is the duty of this court to consider the evidence adduced upon the trial, the rule is well settled that the findings of the court will not be disturbed on questions of fact, unless it appears from the record that they are manifestly against the weight of the evidence. Whether or not such an agreement existed was a question of fact presented to the court, who heard the mitnesses and made his findings, and we cannot say that the court erred in holding that the oral agreement such as plaintiff contends for was made between the parties at the time stated.

Upon the question as to whether plaintiff is precluded from recovering because he was not registered with the Secretary of State, we regard the case of <u>Jarusz</u> v. <u>Namon</u>, et al. 245 Ill. App. 600, and decisions cited therein as controlling. In that case a real estate salesman such the broker by whom he was employed for one-helf of the commission received by the broker upon an exchange of real estate brought about through the efforts of the salesman. A like defense was there interposed, but the court in its opinion said:

"We think that the law requiring a real estate salesman to obtain a certificate from the State authorities is not applicable here. Plaintiff here is not seeking to recover a commission, but to recover compensation from his employer which was paid by the owners of the property to the defendant. If plaintiff were bringing an action against the owners of the property to recover commissions, then the statute would apply; but that is not the situation we have before us."

This case and <u>Sibons</u> v. <u>Williams</u>, et al, 191 Ill. App. 594; <u>Gross</u> v. <u>Strauss</u>, 208 Ill. App. 263, and <u>Simon</u> v. <u>Sollei</u>, 243 Ill. App. 629, thus recognize the distinction between cases where a party, acting as broker or salesman generally, attempts to enforce claims for

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evidence adduced upon the trial, the rule in well neetied this the findings of the control that the findings of the control in distance on questions of the till in the religion of the control of the control of control of the the find placed to the court, who heard the control of and and and and and so comes on placed to control in holding that the oral agreement such as placed to control or the made setues the control of t

Upon the question on the precipited aith the Secretary of Trom recovering because he are not registered aith the Secretary of State, we regard the come of during v. Second et al. Nes ill. app. 200, and decisions eited cherein se controlling. In that case a real actute salesmen seed the prokes by when he was employed for one-half of the countestant received by the prokes upon an exchange of the countestant that defense was the interpretable but the court in its opinion all said:

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This case and Olbona v. Sliftame, et al. 191 ill. App. 894; group v. Strong v. Soliet. 805 111. App. 899.
Strongs, 908 111. Asp. 308, and Siegn v. Soliet. 865 111. App. 899.

Strongs of the second parently, attempts to enforce cinims for

commissions against customers or clients without having qualified in the manner provided by statute, and altuations wherein a party seeks to recover from another part of the commission earned by their joint afforts.

Upon the attachment issues there is likewise a close question of fast which was heard and determined by the court and we are not disposed to disturb this finding.

For the reasons stated the judgment of the trial court will be affirmed.

ASPERMED.

WILSON, P.J. AND HEBEL , J. CONCUR.

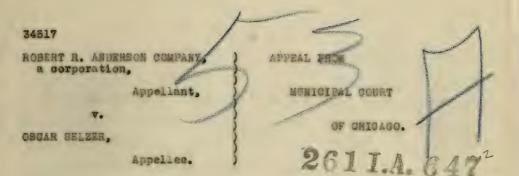
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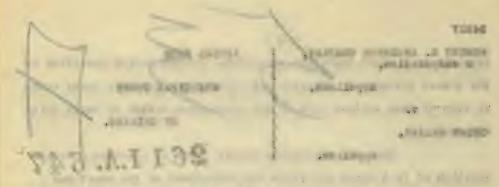
Opinion filed April 15, 1931

Flaintiff brought suit in the municipal Court of Chicago upon a contract for paving the street in front of and butting premises owned by defendant at 2005 Forth Moody Avenue, in Chicago, Illinois. Trial was bad by jury resulting in a verdict and judgment for the defendant, from which this appeal is prosecuted.

business, submitted to the defendent plans and specifications for construction by private contract of a two-course concrete pavement on North woody avenue from the south line of achieve avenue to the north line of arightwood avenue, all of the sork to conform to the standard city specifications, and the city's acceptance of the work was to constitute the fulfilment of the contract; that the contract contained the following provision:

"It is understood that this acceptance is not subject to cancellation except by eritten consent of the Robert H. Anderson Co., and that no verbal agreements will be recognized by the Robert H. Anderson Co., or written agreements unless signed by the representative whose signature appears on the aforesaid proposition."

that defendant, who among other property owners signed this agreement, was the owner of lot two, known as 2603 North Moody Avenue; that he agreed to pay plaintiff the sum of\$433.35 when the work was completed and the city's acceptance issued; that shortly after the contract was signed plaintiff applied to the City of Chicago for a permit to



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ormed by defendent at Sees north Mosey Arena, in Chicago.
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for the defendant, from which this support is prospected.

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nes the owner of lot tro, trees as 2202 dorth Hondy Lyanus; that he agreed to pay protestiff the sum of\$433.75 when the sore was completed and the sity's screpture located; that chartly after the contract was

install said improvement, pursuant to which a permit was issued by the Board of Local Improvements; that afterwards plaintiff proceeded to and did install said improvement, and on the 24th day of september, 1927. the Board of Local Improvements issued to plaintiff its certificate that the work had been completed, inspected and found to agree with the specifications governing the same; that on March 7. 1827, plaintiff wrote the defendant calling his attention to the contract he had signed. thanking him for the same and advising him that the work would be commenced, the present installed shortly thereafter, and that his assessment was fixed at \$435.95; that during the process of installation of said pavement defendant resided on the premises mentioned. saw the work going on and made no protest; that on the 13th day of March, 1988, plaintiff advised defendant by letter that he had not paid the bill for his share of the improvement, and insisted upon payment of the account forthwith; that no ensure was made to said communication, whereupon plaintiff again on the 18th day of march, 1928, called plaintiff's attention to the past due account.

Over the objection of plaintiff the court permitted evidence of a meeting of property owners on March 30, 1987, at which Mr. Knercher and Mr. Notzen of the plaintiff company were present and the statement was made by one of the property owners present that the cost of [15 per foot for the pavement was "pretty high"; that Mr. Knercher thereupon stated that "if anybody was not satisfied he would take back their contract"; that defendant thereupon tendered back his copy of the contract which was accepted by Knercher and that several other property owners likewise tendered back their agreements.

Defendant's signature to the original contract is not disputed. There is a conflict, however, as to whether Kearcher made the statement attributed to him with reference to receiving back contracts of any property owner who was not satisfied, and whether defendant did in fact return his copy of the contract.

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take back their southwat"; that defendant themsupes tendared back
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use present at the seeting on march 30th together with about 75 or 100 other property owners; that both Emercher and Lotsen were there; that some discussion ensued about the expense of the improvement and an opinion given by some of the property owners that the cost was rather high; that Emercher them stated that if any property owners were not satisfied he would take back their contracts, and defendant tendered his copy to Emercher, who accepted the same, and that of several others; that Esteen came to the home of defendant about six weeks thereafter and requested him to sign another agreement, stating that if he refused to do so plaintiff would hold defendant to his first contract.

cari Staffa, a mitness called on behalf of defendant, stated that he lived across the atreet from defendant; that he also signed one of the contracts; that he attended the meeting on Earch 30th, when Kaercher spoke and heard him make the statement testified to by defendant; that he was present at defendant's home about six weeks thereafter when Kotzen called and heard the latter may that if defendant did not sign another contract he would hold him to the first agreement; that defendant, however, refused to sign, whereupon Kotzen stated that everybody in the neighborhood had signed contracts except defendant.

Recreher on behalf of plaintiff stated that he attended the mosting in question; that "there was a lot of political talk and I informed them that the street would be paved"; that neither at that time nor at any other time did he take back any contracts from people who had theretofore signed, and that nebody requested him to do so; that he never knew defendant, nor not him until their attendance upon the trial of the cause in court, and that he never stated at the property owners' meeting that he would accept back contracts of dissatisfied owners.

Then this is the descript on the description to the countried that he of 193 as 193 as seen the short of the seen the short of the country present the seen that the country persons and determ the coet are rether opinion given by some of the property occars that the coet are rether that the single the seen to the bone of defendant about aix that if he refused to do so the bone of defendant to his

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Kotzen, testifying on behalf of plaintiff, denied that he had called on defendant except the first time when he procured his signature to the original contract.

The grounds chiefly relied upon for reversel are, first, that the contract in question could not be terminated by parel agreement of the parties; second, that the evidence tending to show a surrender was improperly received; and third, that the verdict is manifestly against the weight of the evidence.

As to the first contention, the rule followed in this state is well expressed in Alsohuler v. Schiff, 164 Ill. 398. In that case plaintiff sued on a written lease. It appears from the facts that when the landlord demanded rent, which had become due under the lease, the tenent advised him, "I will pay the rent but I want you to fix up the place. I am damaged here every day, and I cannot stay here until it is fixed"; that the landlord thereupon stated, "I won't fix anything for you. If you don't want to stay here you can move out", to which the tenant replied "all right; I will take another place and move out", and the landlord said. "all right". The principal question presented for decision was whether the surrender of a written lease under seal could be shown by perol testimony. As to this the court said that a scaled executory contract cannot be altered, changed or modified by parol, and pointed out that this rule of the common law had been adopted by the courts of this state and followed consistently in a long line of unbroken authorities. The court then proceeded to state that:

[&]quot;A distinction, however, must be drawn between contracts of this character, which are relied on as being in force with some provision alleged to have been changed by an oral agreement, and those which it is insisted, in defense, have been absolutely abrogated and surrendered by parol agreement of the parties thereto. A defendant might, by parol proof, show, in an action against him on a contract or lease under seal, that he had made full payment of all amounts due, and thus was discharged. He might also, by parol testimony, show an eviction where there was no default by him in his

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tion at leastlest our art production rates with as earlier to the ALCOHOL: ALL AND CLOSE OF PRINCIPLE AT ROSSESSES THE STREET that once plaintiff comi on a written iccor. It apports from the facts that show the Landlord demanded roat, which had browns due under the lease, the tensor saving aim, "I thin you the rest but I ment you to the up the place. I am desegted form every day, and . . . mogneted brothmet set tout promit at the eres yes busines t yate of these taken see hi. may not goldype nil theo in botate i stable das and contact the tenent related and reaches lin .him broibes and here . tim and has some reacons and like reduced the principal measure are successful and the contract of the contract of Luran to made ad blues less taken assai assitur a to resubstice edi-Passing only not the want told told to the passing of the passing and two betalog has loung as helthow to beyond thereof and forces alit to struce but to harpabe much had all scenes and to sint aids state and Toilaved consistently in a long line of unbraken authorities. trade woute of behaviors and truce out

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lease, and thus a discharge. We known of no good reason why he may not also show, by parol proof, that by agreement between the landlord and himself he has been released from the terms and obligations of the lease, and has, in pursuance thereof, surrendered possession of the premises to the landlord."

The court also held that the question whether there was a surrender of the lease was one of fact and that evidence upon this question was competent and should have been submitted to the jury, citing Baker v. Pratt, 15 Ill. 568; White v. Walker, 31 Ill. 42%; Allen v. Jaquish, 21 Mend. 638.

and those which have been absolutely abrogated and surrendered is applicable to the case before us, and we accordingly hold, as to plaintiff's first two contentions, that parol evidence was competent to show a surrender of the contract and that the written instrument was terminated by parol agreement of the parties.

The remaining question relates to the surrender of the contract by defendant at the meeting of property owners on March 20th. As to this there is a sharp conflict of evidence. Defendant and two other situesses testified that Emercher offered to receive back the contract of any dissatisfied property owner, and that defendant tendered his copy to Emercher, who accepted the same. On behalf of plaintiff, Emercher and Esteen denied that any such statement was made and that defendant surrendered his agreement. The jury heard all the witnesses, had an opportunity to judge their credibility and resolved the issues of fact against plaintiff. From an examination of the record we cannot say that the verdict is against the manifest weight of the evidence and accordingly we are not disposed to disturb the verdict.

For the reasons stated the judgment of the Municipal Court will be affirmed.

AFFIRMED.

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ACCRECATE AND ADDRESS OF A PARTY ASSESSED.

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S. R. BURGOYNE.

(Complainant) appelles.

J. L. PYLE, MENRY BAASE, ANGELINE CRETTS, ARETA GREPPS, CRARLES RINGER, individually and as trustee, and the unknown owner or owners, holder or holders of certain notes secured by and described in a deed of trust from Henry Sease, Angeline Crepps and Areta Grepps to Charles Ringer, as trustee, dated May 9, 1927, and recorded in the Office of Registrar of Titles of Sook County, Illinois, on June 9, 1927, as Booument No. 357869.

Defendants.

On appeal of HENRY BARRE, ANGELINE CREPPS and ARETA CREPPS.

APPEAL PROM SUPERIOR COURT

COOK COUNTY.

(Defendants) Appellants. 2 1 1 A. 647

Opinion filed April 15, 1931 MR. JUSTICE FRIEND delivered the opinion of the court. This case comes up on appeal, together with case number 34638. The essential facts and the various contentions made are discussed in the letter opinion. Only one additional ground for reversal is urged in this proceeding.

In addition to the various contentions made in case number 34639, it is here urged that the master and chancellor erred in accepting in evidence in this case, over the objection of defendents; a carbon copy of a transcript of testimony given in the other case. where these defendants were not parties and involving property not here involved.

With reference to this contention it appears that the two proceedings were referred to the master and heard contemporaneously. The only testimony offered on behalf of the complainant, Burgoyne, was taken March 23, 1928. This was supplemented by documentary proof on April 11, 1928. At the first two hearings

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Opinion filed april 15, 1931

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counsel for defendants laid the foundation for an objection to the duplication of records "should be subsequently desire to avail himself of it." In other words, evidence which was applicable to one case, was alike applicable to the other case, and counsel for complainant and intervening petitioners, for the sake of expediency. proceeded to introduce the testimony of witnesses in case number 34639 in contemplation of introducing a carbon copy of that evidence and incorporating it into the record in this proceeding upon the ground that the testimony would be identical in both cases and would therefore avoid the necessity of having witnesses testify twice to the same satters. This plan was followed through a considerable portion of the hearings before the master, and in some instances there was cross examination by the defendants of witnesses in reference to both proceedings. Thile defendants consent to this procedure does not appear in the record in express language, the record discloses no actual objection thereto and shows that on November 2, 1988 counsel for defendants asked the master for an order upon the complainant to turn over the original typewritten transcript of the testimony taken on behalf of the complainant which was written up in type-ritten form. The record also discloses a like motion made before the master followed by a motion for a continuance "until counsel should be afforded an opportunity to examine the testimony taken on behalf of the complainant". Moreover on December 11, 1928, defendants' counsel unqualifiedly moved the master to strike from this record the testimony of Surgoyne, the complainant, solely on the ground of alleged variance between it and the averagnts of the bill as amended. The first actual objection to receiving the direct evidence of witnesses in the second case (34538) appears on page 81 of the abstract. Prior thereto 279 pages of testimony had been taken. following this objection the testimony of two other witnesses appears

counsel for defendance inid the foundation for un objection to the Linus of animak vilnampoodum od bluede" whreen to melicolique bismelf of it." In other words, swidenes which was auplicable to net frames has seen redto eds of midspilers offic and onne . The time to correction octabilisers, for the sale of expediency. particular than the Continues of witnessess in particular many as such that the property of the property of the authorises as their ads man universary side of brooms and over the universal and biron has smore about at Lordson of Live transland per hage party therefore avoid the measurity of having eitheress testify twice to This cian was failured through a nonsiderable the neme suctions. parties of the heavings before the master, and in some inchesses that was orose exemination by the defendants of withouses in reference to both procestings. This defendants' concent to this procedure does not appear in the record in express language, the respect discloses no actual objection threats and shows that on Herenber 2, 1918 -mos off modu rebro me ref refers of being standard to leanues picinant to term ever the original typesritten transcript of the towalkane token on being at the associations which we exist no in translitan form, for rotard also dissest a like worken mide before the mater fellowed by a motion for a continuance "until council she atforded an equartenity to examine the testimony "Frunteduces hat In hir day an seasy workeyer on leasenger it, lett. defendanta' council uncunifically moved the menter to attice from this rough the testiment of mornoyas, his complaint, said the add to advantors add age at massing paratrey hearlin he haver and frouth and nativisors of mother to invite the Alrest bell no transfed. evidence of althouse in the acoust ones (34858) appears on rese 81 of the shetrant, Frier thursts 270 pages of teatimony had been tains, following this objection the tentinous of two other situation also are

and no objection was made to the duplication of their testimony to cover this case. There appears on page 107 of the abstract the following statement by defendants' counsel, "We have always followed the practice of starting in one case, and then if I can consent to it, I will consent that this be written up with the other case." It was shortly thereafter that counsel definitely refused to follow the practice which had theretofore been adopted between the parties, and we are now asked to reverse this cause on the ground that the master permitted various testimony taken in the first proceeding to be introduced and attached to the transcript of record in the instant case.

We are not disposed to reverse the decree upon this ground for several reasons: (1) we are satisfied from an examination of the record that counsel for defendents made no real objection to the procedure followed by the parties and concurred in by the master. until after several hundred pages of testimony had been taken. If counsel desired to insist upon his point that the two cases be tried separately, it was their privilege to do so, but it was also incumbent upon them to insist on their rights from the beginning and not to lull the other parties into believing that they would make no objection thereto and allow the lien claiments to proceed in a manner apparently satisfactory to them through a major portion of the case. (2) The only objections filed to the master's report which reised this question are objections numbers 1 and 33, both of which are general in their nature. They do not point out what evidence of particular witnesses is complained of, and require the court to sift out all the evidence adduced on behalf of defendants received in one case over the objection of counsel. Many of these objections embrace testimony of all witnesses. It has been generally held that objections to a master's report must be specific and must point out with reasonable certainty the precise metters complained of. (Springer v. Kroeshell, 161 Ill. 358:

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Over this case. There appears so page 107 of the abstract the the cover this case. The abstract the startion of starting in one case, and then if I can concent to it, the proceed that that this he written up with the other case. It was abortly thereafter that this counsal deficitely refused to fuller the about the reserve as are now asked to revewer this case on the ground that the reserve permitted various tentament takes in the first proceeding to be intro-duced and attention to also account in the instant case.

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Hays v. Mammond, 162 Ill. 133). (3) We are satisfied from an examination of this record that substantially all of the testimony of the witnesses adduced in the manner complained of by counsel could of its very nature be nothing but a duplication of that which was given in case number 34639. The contracts of defendants having each been made orally at one time covering both jobs could be established only by the narration of the same conversation. The buildings progressed contemporaneously and were constructed from the same plans and specifications, and the lumber was delivered to both collectively. Therefore the testimony as to deliveries was necessarily the same. surgovne had contracts for fixed amounts. Questions of delivery were not involved as to his claim. He completed his work on both buildings and there could have been no variance in his testimony in the two proceedings. Consequently we see no force to the contention that defendants could in any wise be prejudiced in the slightest because of the method adopted upon these hearings. It was said in 5. C. St. Ry. Co. v. Maday, 188 Ill. 210:

"When the court can see from the record that an error committed by the trial court in the progress of the case was a harmless one, or that its injurious effect or harmful character was obviated, so as not to affect injuriously, in the final judgment, the rights of the party against whom the error was committed, it should not be allowed to work a reversal."

For the reasons stated in this opinion upon the additional ground urged herein, as well as for the reasons stated in the opinion in case number 34639, we believe the decree of the Superior Court should be, and the same is, accordingly affirmed.

AFFIRMED.

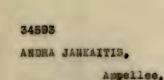
WILSON, P.J. AND HEBEL, J. CONCUR.

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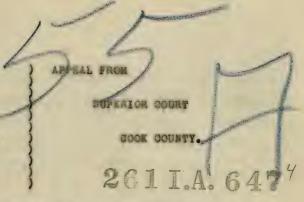


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V.

FORT DEARBORN AUTOMOBILE INSURANCE COMPANY, a Corporation,

Appellant.



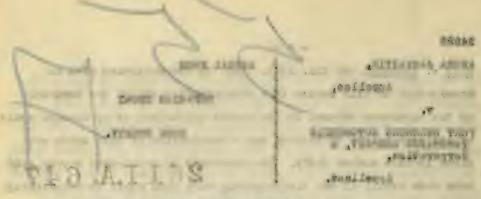
Opinion filed April 15, 1931

MR. JUSTICE FRIEND delivered the opinion of the court.

Plaintiff brought suit in the Superior Sourt of Gook Sounty to recover \$1954.83 on account of a fire loss. Trial was had by jury resulting in a verdict and judgment in favor of plaintiff for \$2168.32, being the amount claimed plus interest.

The declaration alleges that plaintiff was the owner of property at 2718 North Cicero avenue, in Chicago, Illinois, and that the premises were damaged by fire on September 23, 1937; that there were three fire insurance policies on the property aggregating 127,000; that the adjusters for the insurance companies fixed the loss at \$13,398.36, of which defendant's pro rate share of the loss in accordance with the amounts of the policies was \$5,954.83, on which defendant paid \$4,000, leaving a balance of 1954.83; that after the loss was adjusted defendant agreed and promised to pay its pre rate share.

Defendant filed a plea of the general issue and two special pleas, setting up that defendant had paid plaintiff \$4,000 in full satisfaction and discharge of all claims under the policy, and had taken plaintiff's receipt and release under scal. Plaintiff's replication to the two special pleas denied that he had ever given a release or entered into an accord and satisfaction.



Opinion filed April 15, 1981

AM. JUSTICE FUILDE delivered the opinion of the court.

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and had token plaintiff's receipt and releman under small. Finitetial titl's replication to the two openial place denied that he had ever given a relevan or entered into an accord and extistaction.

The essentail facts disclose that plaintiff was the owner of a garage at 2718 North Cicero Avenue, which was damaged by fire on September 23, 1927; that there was \$27,000 worth of fire insurance on the property represented by three different companies: that defendent had issued a policy for \$12,000, the Girard Fire & Marine Insurance Company for \$5,000, and the Newark Fire Insurance Company for \$10,000; that there were two mortgages on the property for \$11,000 and \$11,500, respectively, and the actual cash value of the property at the time of the fire was \$17,500; that immediately after the fire plaintiff engaged william W. Jackson, a fire insurance adjuster, to represent him in adjusting the loss and damage, who notified each of the three insurance companies of his engagement; that the three companies thereupon each appointed an adjuster, Dreihs for the defendant, Atevenson for the Newark Fire Insurance Company and Persons for the Cleard Fire and Marine Insurance Company; that Jackson thereafter sent to the premises with a contractor and made a detailed estimate of the damage caused by the fire, photographed the premises and made an appointment to meet the other adjusters; that several meetings of the adjusters were held during Sctober and November/the offices of Magner & Slidden, going over the schedules and items of loss in an effort to come to an agreement as to the damage; that at the meeting held on October 25, 1927, an offer was made, the exact amount of which does not appear from the record, which Jackson thought would not be acceptable to the plaintiff, but stated that he would take it up with him; that another meeting was held on Movember 4, 1927, at which further discussion ensued and plaintiff's adjuster was then handed an agreement for Submission to Appraisers, eigned by all the companies, appointing Frank E. Doherty as their appraiser, in contemplation of submitting the fire damage to a fourth person in the event that the three appraisers could not

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agree on a figure; that the parties met again on November 14, 1927, at which time, after some discussion, the sum of \$1019 was added by the adjusters present to some previous amount which had been discussed at other meetings making a final figure of \$13,398.36, and that the agreement for submission to Doherty, their appraiser, was never acted upon. Jackson submitted the final figures to plaintiff who accepted the same and proofs of loss were made out by Stevenson or Perssons, and plaintiff settled with these two adjusters on that basis. In January defendant paid plaintiff \$4,000 and took a release of claim "in full settlement of all claims for damage to property on or about the 23rd day of September, 1937, by reason of fire", signed by plaintiff, his adjuster Jackson and two others who were interested in the property as mortgagees.

There is some conflict in the evidence as to whether Dreihs was present at the meeting on November 14. Jackson testified that Dreihs attended. He did not remember which one of the adjusters acted as spokesman at the meeting nor what was said, but seemed quite positive that they were all sitting around the table when the final figure of \$13,398.36 was mentioned and no objection was made thereto by any one. On direct examination Stevenson testified that he thought Dreihs was present, but on cross examination stated that he could not be positive. Nowever, he testified to a conversation with Dreihs shortly after the meeting in which he told him "the loss had been closed off at \$13,398.36." Dreihs denied having attended the final meeting and his agreement to settle on the basis of the foregoing figures.

In this connection there was received in evidence, over defendant's objection, plaintiff's sworn statement in proof of loss, to the back of which there is pasted a typewritten "statement of loss", bearing the rubber stamp signature of John Breihs, showing the following:

at which time, after some discussion, the sum of (1018 was added by the adjusters present to some previous enough which had been discussion to some which had been discussion the agreement for submissery as Soberty, their appreciate, was not succepted the same and proofs of lice were such each took a release the contact the agree and plantiff (4,800 and took a release of or about the agrae and supplement, 1007, by readen of first discussion by plantiff, his adjuster lankage and two others she sere interested in the property as mortgagess.

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In this commention there was received in avidence, over defendent's chipselies, picintiff's every entered in great of love", to the book of chipse is pasted a type-ritten "etatement of love", bearing the rubber starp signature of John Breihe, showing the following:

- 4 -

"STATEMENT OF LOSS.

Andrius Jankaitis and Marcelle Jankaitis,

Obicago, Ill.

Fire: Sept. 35, 1827.

BOUND VALUE LOSS

Sound value as agreed, Loss and demais as agreed, \$17,500.00 \$13,386.56

JOHN DREING & COMPANY.

John Dreihs, Adjuster. 9

Underneath this statement and casted to it there appears plaintiff's verified notice of assignment to thitaker & Jackson of fees due them as adjusters from the proceeds of plaintiff's settlement. The original proof and statement of loss, together with this notice, sere filed here by stipulation of the parties. It is urged with respect to these documents that they corroborate plaintiff's contention that Oreibs on behalf of defendant agreed to the final settlement figures and were therefore properly admitted in evidence. Defendant urges, bewever, that the court erred in admitting them, and argues that proofs of loss, while competent to show compliance with the terms of the policy, may not be considered in accertaining the amount of danger. bile it is true that plaintiff sued on the agreement to pay rather than on the policy, we believe the documents were properly admitted to sustain the allegation of the declaration that proof of lose was furnished by plaintiff and not waived. Furthermore the typewritten statement of loss was competent to prove the agreement upon which plaintiff's suit is founded, and to corroborate plaintiff's contention that breihs agreed to the settlement on behalf of defendant.

The evidence is conflicting as to when the statement of loss digned by Breihs was attached to the proof of loss. Jackson testified that he sent a copy of the proof of loss to each company.

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than or anton booms

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The evidence also shows that Dreihs, on behalf of defendant, received a "statement of loss", which, according to his testimony, he "ignored" and left lying on his desk until early in January, when, as he contends he pasted it to the proof of loss. Plaintiff urges, however, that the statement of loss was pasted to the other document shortly after the final meeting of adjusters on November 14, and not in January, as Dreihs testified. Whatever the fact may be, it appears that defendant made no objection to the statement of loss until after the two other companies had settled their proportionate shares.

as to these various circumstances bearing upon the important question of fact as to whether Breihs wreed to the final settlement figures. The jury heard the witnesses, had an opportunity to determine their credibility and resolved the issues in favor of plaintiff. It appears to us from an examination of the record that whether or not Breihs participated in the meeting of November 14, he was certainly apprised of the settlement shortly thereafter, and neither he nor the defendant whom he represented made any objection thereto until long after the other companies had paid their proportionate shares. In view of Breihs' knowledge as to the settlement figures, his written consent to the statement of loss and the further circumstance that no appraiser was appointed, as would have been necessary in the event of a disagreement, we are not disposed to disturb the verdict upon this question of fact.

Some contention is made as to Dreihs' authority to settle without the express consent of the defendant. We believe that the record shows Dreihs' authority. The fact that he apparently handled the entire matter for defendant and acted in its behalf, and later advised them of the result of his course of conduct, indicate that he had authority to act.

the statement of loos we pasted to the other decount shortly after the final meeting of edjusters on November 16, and set in Jonuary, as final meeting of edjusters on November 16, and set in Jonuary, as firether that the final setties to the statement of less until after the two other sempenter had settied their propertionate shares.

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It is further urged that the release being under seal, the question of consideration cannot be inquired into in a suit at law unless fraud is alleged and shown. There is no charge of fraud in the instant case, but defendant contends that the release of January 18th was given by plaintiff under seal and is, therefore, a complete bar to this suit. An examination of the original instrument shows that it was signed in the following manner:

"Andra Jankaitis, Whitaker & Jackson By W. M. Jackson, A. A. Olin, his Anton X Elazlanski (Seal)"

The receipt to which these signatures are attached is a printed document evidently prepared and used by the adjuster, and the word "seal" appearing thereon after the signature of Anton Elazlanski is part of the printed portion of the instrument. To support its contention defendant cites cases purporting to hold that where a bond or scaled instrument contains more signatures than scals, the court will presume that each signer has adopted some one of the scals attached. We have examined the authorities cited in counsel's brief and find only two cases which throw any light upon this cuestion. Bavis v. Burton, an early case reported in 3 Scammon 41, holds that where a bond or other sealed instrument purports on its face to be scaled by all the signers and there are several seals to it but not so many as there are names. the court will presume that each person signing it adopted some one of the seals and the bond will be valid against all. Relying upon this authority the court in Ryan v. Gooke, 172 Ill. 320, held to like effect. In the latter case a contract was signed by five persons. the first three of whom had the word "scal" following their respective signatures. The court, giving expression to and emphasizing the element of intent, held that the last two signers will be presumed to have adopted the seals of those whose signatures preceded theirs.

is further arged that the release being under each, under each at law to the control into in a suit at law unions from the aliaged and shown. There is no charge of frond in the instant case, but defendent contends that the release of January 18th instant case, but defendent contends that the release of January 18th in the fallowing canner:

The receipt to which there signstures are attached is a printed docunent ovidently exemped and used in the adjuster, and the word "senl" to true at inqualization and to contample and rests account pairteens the uninted portion of the luctuanus. To support the centered belose to base a reds that bled of paid togeth each cotto tachalole Anotheres contains more eigenfaces time colle, the secrit will proven hedditalies and in one betyebe and tempe hose tadi ort vino buil has taive e leenvoo at hetlo as Litzedius edt benimere OF THE PARTY OF SERVICE SAN mess which three our digit were this suretimaredso to bood a system that abled it houseast al betrope a sone yiras orangle eds lie to belsee od of noel est no atrogram succession talles. and there are newern sense to it but not as many as been are pages. ago suce bedgebe ti galugia accrey dose tods emusery file fruce odd mone pairied .IIs senious biles and like beed add has alove out to this estimating the sount in from w. Course, LTS Ill. 200, hold to like In the latter come a contract was signed by five persons. effect. evideeges stady palvolled "Iven" brow out had made to wead test end The court, giving expression to and emphasizing the aignatud mania element of intent, held that the last two signors will be presumed to estant tobecome countenate anothe sent to also and the total estants over We have before us, however, a different situation. The document in question was signed by plaintiff and three other persons. Elazlanski's signature is the only one opposite whose name a seal appears, and under the circumstances and in the absence of any evidence, showing an intent to adopt the seal, the court cannot presume that those whose signatures appear before Elazianski's intended to adopt his seal and sign a sealed instrument. It was so held in Essay V. Preston, et al.
20 Ill. 389, where the court said:

"If one party executes an instrument and attaches his seal, and others afterwards sign it silently without attaching seals, they are presumed to adopt the seal of the first, and, as to all, it is a scaled instrument. If, however, the first sign without a seal, and the others add seals to their names, without the direction or consent of the first, then he cannot be presumed to adopt their seals as his, and it continues, as to him, a simple instrument, as it was then he first executed it."

not to be attached to the presence of the printed word "seal" in the instrument in question, for as the sourt said in <u>Provide</u> v. <u>Ford</u>, 294 Ill. 319, in a <u>cuo warranto</u> proceeding, where the statute required a seal and the same was omitted:

"The requirement of a scal in the execution of documents by individuals has become a more formality. It means nothing. Private scals no longer exist as a scans of execution of specialties, for even an individual scrawl is not required. In most deeds the word 'scal' is printed on the blank form which is used and the grantor does not know whether he has used a scal or not. It depends upon whether the word was printed on the paper or not. The solemnity of the scaled instrument is purely rickwickian and no longer represents an idea."

It is further contended that pleintiff's claim so far as the defendant is concerned remained in dispute until it was compromised in January for 14,000. If this were true, the acceptance of the above sum in settlement of a disputed claim, and in the absence of fraud, would bar plaintiff's recovery. However, the jury by its verdict settled the question whether plaintiff's claim was in dispute after Hovember, and, as heretofore indicated, we are not disposed

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not to be attached to the encounce of the printed word accip in the instrucent in question, for so the court said in Feels v. Ford, 294 Ill. 513, in a sub instructo proceeding, where the statute required a sual and the same we walthed:

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It is further contended that plaints is elim so for at the defence until it was some the dispute until it was some promised in Armory for 64,000. If this mere true, the mospicace of the shave out in astilenest of a disputed elsis, and in the absorption vertical elsis was also absorpt vertical the cuertion whether souther was in dispute.

to disturb the verdict upon this issue of fact, and the payment by defendant of part of a debt, the amount of which was definitely ascertained and due, did not constitute an accord and satisfaction. Morrill v. Baggott, 157 Ill. 240.

counsel's briefs contain some discussion as to the equities of this case. It does not clearly expear whether this phase of the case was presented to the jury or not, but the argument evidently relates to a provision in the policy (page 3, line 96) reading as follows:

"This commany shall not be liable under this policy for a greater proportion of any loss " * " that the amount hereby insured shall bear to the whole insurance " " and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto."

This provision contemplates that the defendant, under its policy, shall not bear a greater proportion of any loss than the amount insured shall bear to the whole insurance, and it would therefore be manifestly unfair that they should very a lesser proportion of the loss than the amount insured bears to the aggregate insurance. In other words, defendant's \$4,000 settlement is based upon an actual loss of only \$3,000, whereas the proportionate shares paid by other insurance companies are based upon an actual loss of \$13,396.36. Evidently the other companies paid their shares in reliance upon defendant's agreement to pay its proportionate share, and if there are any equities in the case, they would seem to require that defendant pay its loss upon the same basis and in the same proportion as the other companies paid theirs:

Defendant complains because the court refused to give instructions numbered three and four, but makes no argument to support its contention. We shall, therefore, assume that these objections are waived. It is also contended that the court erred in instructing the jury that the papers pasted on the back of the proof of loss were evidence of a promise on the part of the

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defendant to pay a specific amount. It appears that defendant asked the court to instruct the jury that the proof of loss should not be considered as such evidence. The court refused the instruction as offered, but modified it by inserting the words "exclusive of the papers pasted thereon", and it is contended that this had the effect of calling the jury's attention to the papers on the back of the proof of loss and inferentially telling them that those papers should be considered as proof of a promise on the part of defendant. We do not agree with this criticism of the instruction as modified. The statement of loss was competent evidence for the jury's consideration and the instruction, as given, was not, by reason of its modification, applied to the objection contended for.

give instruction number ten on behalf of defendant. This instruction refers to a dispute between plaintiff and defendant as to the amount for which defendant was liable for damages resulting from the fire loss. It is contended that the question of whether or not there was a dispute at the time \$4,000 was paid to plaintiff and a receipt taken was one of fact and should have been submitted to the jury. It appears, however, that by instruction number 11, given by the court, the jury were told in undistakable language that if plaintiff had not proven the agreement contended for by a preponderance of the evidence, the jury should find for the defendant. The record fails to disclose that there was any serious dispute subsequent to hovember, 1927, and therefore there was no evidence upon which instruction number 10 could be based, and we believe that the same was properly refused.

For the reasons stated we are of the opinion that no error was committed, and accordingly the judgment of the Superior Court will be affirmed.

AFFIRMED.

defendent to pay a specific accura. It appears that televies asked the court to tastruction to the pay the roof of less should not be considered as anch evidence. The court releast the instruction to plants, but modified it by inserting the courts desired that the effect papers payed the inserting the presenting the jury's strention to the papers on the book of the proof of lose and inferentially telling them that these papers should be considered as proof of a preside on the part of defendant. As do not considered as proof of a presidence on the part of defendant. The state-series this oritions of the instruction as modified. The state-ment of lose was available, the state-ment of lose was available, the state-ment of lose was available that the jury's consideration and ment of lose was available to be reason of its modification.

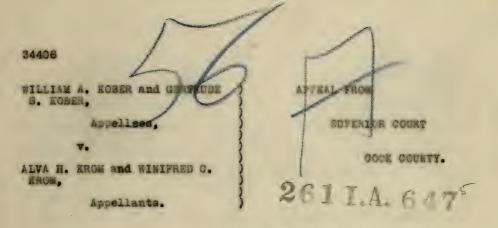
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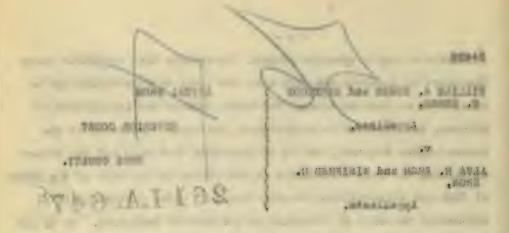


Opinion filed April 15, 1931

This is an action in assumpsit to recover damages for breach of a real estate contract, by the terms of which the plaintiffs agreed to sell and the defendants to purchase certain real estate in the City of Chicago. The case was tried before a jury, which rendered a verdict in favor of the plaintiffs for the sum of 12,100, on which verdict judgment was entered by the court, and from which the defendants appeal.

of the plaintiffs, who acted for Bertrude E. Rober, his wife and co-plaintiff, became acquainted with the defendant alva H. Krom, in March, 1937; that the defendant informed the plaintiff that he was interested in purchasing the plaintiffs' building located at 4445-47 Clifton avenue in the City of Chicago; that the defendant alva H. Arom, together with the plaintiff william A. Rober, and plaintiffs' tenant, Amodt, inspected both the exterior and the interior of the building in Earch; that this building was leased to Amodt in April, 1927, at a rental of 1425 per month, and was being used by him as a rooming house.

That on May 20, 1927, both of the parties executed a written contract for the purchase of plaintiffs' building; that the contract is in the form of a real estate exchange contract, and



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that on May 30, 1807, both of the parties escuted a written contract that the contract is in the form of a real estate exchange contract, and

provides in substance that plaintiffs are to convey their property to the defendants for a consideration of 141,000, which is to be paid for by the defendants by the assumption of a first mortgage of \$14,000; by the execution of a second mortgage for the sum of 120,000, and by the delivery by the defendants to the plaintiffs of a \$7,000 mortgage on certain property in Los Angeles, Unlifornia; that upon delivery of the abstract of title the defendants shall, within ten days after receipt thereof, deliver to the plaintiffs or their agent, a note or semorandum in ariting, signed by them or their attorney, specifying in detail the objection they make to the title, if any, and that the plaintiffs shall have sixty days after notice of such objection to cure any defeats so specified.

That the abstract of title to the property was brought down, and on June 5, 1927, was deposited by the plaintiffs, together with a signed copy of the contract and the lease of the premises, with John Beng, cushier of the Fidelity Trust and Savings Bank of Thicago, whom alva H. Aron, one of the defendants, suggested as an escrew agent; that the abstract was turned over by Bens to the defendants for examination; that on June 14, 1937, the plaintiff William A. Rober, wrote the defendants accepting the trust deed on the Los Angeles property. On the next day the plaintiffs received a letter from the defendant alve H. Brom, stating that he had received a letter from his attorney, after an examination of the abstract, to the effect that the United States Covernment had a lien on the property: that on June 33, 1987, the defendants wrote and mailed to the plaintiff william A. Rober, a post card advising the plaintiffs that the defendants had sent final instructions to Sens and that plaintiff should call at the bank to see Sens, which he did, and that Sens told the plaintiff that he had received a latter from the defendants asking him to cancel the contract, but that he was not acting as agent for either party, but was merely holding the papers for both

to the defendants for a consideration of '41,000, which is be no point for by the defendants by the resemblian of a fixed dartgage of paid,000; by the execution of a extend mortgage for the sum of 100,000, while and by the delivery by the defendants to the plaintiffs of the upon delivery of the acetains of title the defendants chail, within ten days after receipt thoughous, deliver he inclination or their strerney, specifying in detail the objection they make tentheir strerney, specifying in detail the objection they make tentheir strerney, specifying in detail the objection they make tentheir strerney, specifying in detail the objection they make tentheir

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of them; that the picintiff immediately took the abstract from eenz and brought it to his attorney forrison to have the defect mentioned in the defendant's letter removed; that on June 30, 1827, morrison wrote the defendants that he had conferred with the United States Assistant attorney Ceneral with respect to the consent decree and that under the circumstances and in view of the fact that the plaintiffs had not been served with any notice of the proceeding, the government had no objection to the vecation of this decree and the dismissal of the suit; that on July 14, 1887, on motion of the United States Assistant Attorney General, the decree in said suit was vacated and set aside and the bill of complaint dismissed: that immediately upon the vacation of such decree worrison took a certified copy of the order to the Chicago Title & Trust Company. which noted the diamissal of the suit on the abstract; that thereafter, on July 20, Merrison wrote the defendants and Bone that the decree had been vacated; that on August 4 the plaintiff William A. Kober, wrote the defendants and Benz that on August 15 he would appear at the Fidelity Trust & Davings bank and tender performance of the contract and call upon the defendants to verform the latter's part of the contract; that on august 15, the plaintiffs tendered a warranty deed to the property, which was refused by one Ethn, an officer of the bank, who stated that he could do nothing in the absence of the defendants and Bens. About the time the tenier was made at the bank, pisintiff willism a. Kober met the defendant Alva M. Krom, in Chicago and told him that the plaintiffs were still ready to go through with the deal; that the defendant replied that he would confer with his attorney and get the abstract for further examination; that shortly after the and of august, 1987, the defendant authorized his attorney, Robert Holmes, to take the abstract from Senz and make an exemination of the same, which he did. and on September 6th wrote to Morrison, plaintiffs' attornsy, and told him that he had returned the abstract and letters to genr.

and such correct oil that placellesses Thirefalls out part posts to penalgree souther and eval to new trees y crease and of it daysons has in the defendance letter removed; that an aune th, 1927, marriesm espect the defendants the had confered with the Late to be been her provid Interest but at frequest ofthe Locatest Statestill designation -minis and dadd back and be walv no has assessmente and relace tadd and positioners, not be entired the data never the tot of the getterent has objective to the vecation of this terrer and the hesing out to solve we . This at what see that to be welmeit States Assistant Attorney Convent, the decree is said out tour in the last the last of a list did but object the besiever a good condense toyont four to make the old stoy official a estiled oncy of the order to me Chionge fills a Trust Comment. waved field glocateds and the said to lessionic and hoven doing effer, on July 80, mersison wrote the defendance and come that the If willist Thitship will be ranged in forty Balance heaf and hereal lober, wrote the defredance and here that on human 15 he would and providing values for their appropriate Proof of Parkey and the Country of n'restal and aroured of examples and main lies has southed and to bershest attinuing ade to reque to that the aut to drug a marrenty dead to the presenty, which was refused by one falm, an efficer of the bank, she stated that he could do nothing in the absence of the defendence and hear. About the time the tender pag mode at the bons, pinintil william a, Moher met the defendant liva i. Hoos, is Chicago and bain him that the plaistiffs were still and beliger sangured the deal; sads the defendance in of these he would confer with his attentor and and the absence for further entminstant that abertay after the Sund of angust, 1887, the definit authorized the ablance, Popular tales the take the able ad doids teme and to not enteren as that and not sentered the carrier of the care to derifical plantification of some of the carrier

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and that the defendants were unvilling to consummate the deal because of the consent decree and because of insufficiencies in the lease of plaintiffs' property.

The plaintiffs contend that while the defendants assign as error, and argue that the judgment is contrary to the law and the evidence, such objection is not available to the defendants, instauch as the motion for a new trial and the order overruling the same are not preserved in the bill of exceptions.

appears that the motion for a new trial and the ruling thereon were not incorporated in the bill of exceptions. Failure to include the motion for a new trial and the ruling of the trial court does not bring before this court for review the question of the sufficiency of the evidence to sustain the verdict. The rule applicable to a case of this kind is stated in the case of The Feonle v. Sabrys, 339 Ill. 101, wherein the Supreme fourt uses this language:

"To permit a review of an order denying a motion for a new trial the bill of exceptions must show that such a motion was made and the order of the court denying the same. The only method by which these questions can be preserved is by a bill of exceptions. (Call v. Feeple, 201 Iil. 499; harris v. Feeple, 130 id. 457.) In order to bring before this court for review the question of the sufficiency of the evidence to sustain the verdict it is necessary that the losing party make a motion for a new trial, and upon its being evertued except to such ruling, and to include such motion, the order overruling the same and exceptions thereto, to other with the evidence, in a bill of exceptions. (Yarber v. Chicago and alton sailway Co. 235 Iil. 588.) he notion for new trial, with the ruling thereon, having been preserved in the bill of exceptions, this court cannot review the sufficiency of the evidence."

The recital by a clerk in a common law record that a motion for a new trial was made and overruled is not sufficient and does not preserve the question on appeal unless included in the bill of exceptions. Greenwell v. less, 208 Ill. 459.

It does not appear in the transcript of the record that the defendants objected to the living or refusing of the

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instructions offered, nor does it appear at whose request the instructions were given or refused; and, further, the record does not disclose that all of the instructions offered were incorporated in the bill of exceptions. It is impossible to ascertain from the record at whose request the instructions were offered, which is important in order to review such instructions. In view of the record, this court is unable to pass upon the errors assigned on that phase of the case.

The defendants argue that the court erred in admitting improper evidence offered by the plaintiffs, and complain that a witness for the plaintiffs in testifying made use of a memorandum. The trial court may in its discretion permit or deny the use of a memorandum to refresh the recollection of a witness, and where the court permits a witness to refresh his recollection over objection, such action by the court will not be considered erroneous, unless the action of the court is clearly prejudicial. The defendants failed to make a motion to strike such evidence from the record, and they do not point out in what respect the use of a memorandum by the witness for the plaintiffs was prejudicial.

of the plaintiff william A. Rober with one John Benz, which was had out of the presence of the defendant. It seems from the evidence that the plaintiff received a postal card from the defendant advising him to call at the Fidelity Trust & Savings Bank to see Benz, to whom the defendant has sent final instructions regarding the subject of this controversy. The facts would indicate that Benz was to transmit the instructions of the defendants to the plaintiffs and it necessarily follows that the conversation with respect to the instructions was properly admitted in evidence. This conversation was made competent from the fact that the defendants directed the plaintiff william A. Rober, to call on Benz, who was to advise the plaintiffs of the instructions given by the defendants.

instructions offered, nor ions to those request the disclose the disclose the disclose the intruction offered were incorporated in the bill of exceptions. It is impossible to exception the record at above the interpretant in at above traveless the interpretant in order to review such instructions rere of the vecera, this court is maddle to pass upon the errors hadged on that phase of the ours. In the court error in the court is and in admittant

witness for the plaintiff in testifying made use of a somerandum.
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The defendants further contend that the court erred in overruling the objections of the defendants to the admissibility of evidence as to acts that took place after June 23, 1987, when, it is claimed, the defendants cancelled the contract. It appears that the defendant Alva N. Eroz wrote to Benz asking him to cencel the contract with the plaintiffs. The plaintiffs' theory is that under the terms of the contract they were permitted to remedy the alleged defect in their title, and that they proceeded to do so and notified the defendants to that effect. The evidence also shows that the plaintiffs made a tender to the defendants on August 15, 1937, of the deed conveying title; that thereafter the plaintiff William A. Rober met the defendant Alva H. Bros and in that conversation the defendant stated that he would have his attorney examine the abstract again, and subsequent thereto the defendants' attorney examined the abstract and wrote to the plaintiffs' attorney on September 6. 1927, stating the result of his examination and declining to accest the title.

Regotiations having been resumed and continued to September 8th, the evidence as to all conversations and transactions which took place up to that time, was properly admitted by the court, and when the defendants finally declined to accept title, it was not necessary for the plaintiffs to make a further tender of the deed to the property in question. A tender would have been unevailing in view of defendants' refusal to perform. The rule of law is, as stated by the Supreme Court in the case of <u>Bucklen</u> v. <u>Masterlik</u>, 155 Ill. 423;

"that a tender is never required, nor is its emission ever prejudicial, where, from the circumstances, it is clear that such tender, if made, would have been refused. The law does not require the performance of a mere idle act, or one which would be useless, and appellant had never, at any time, indicated that if the deel were tendered on this title he would accept it. There a vender objects to a title, a tender of a deed which he declares he will not accept is unnecessary.

horro druce ent deat havened unitary equalorable edt th companies of the companies of the collection to the collection of of evidence as to sets that rock place after force 73, 1967, whon, it is element the defendants cannelled the sentence if appears isome of mid galias ones of adore would ill avil parheeled and tads the existency with the probabilities. The particulate, though is that add thenes of pastimas are find toesteen out to sense out reput has on short interest unit, but our paints their record depails party on the companies of the arrivant for any or also also any any that VINE ALL PRODUCT TO EXAMPLE OF TOTAL A SINCE PARTIES AND sallin Thiradalo adv wat hereoft part talke and person beat adv. he as Ruber met the defendant Alva d. Arem and in that convergation the servicus est animore vernessa and avad binom ad test betwee tembertos bindours greenstes formiterial all adversal presumate les galeja the abstract and erote to the plaintiffs' attorney on September 5. former of printical has reliable and to plone and pulleys , will ASSESSED NOT

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Hampton v. Succkenegle, 9 S. & R. 212; Tierman v. Rolend 15 Pa. St. 429; Lyman v. Gedney, 114 III. 388; Gunter v. Daniel, 4 Mare, 420; Webster v. French, 11 III. 254; Shepler v. Green, 31 Pac. Rep. 42."

contention is also made by the defendants that certain exhibits in evidence were wholly incompetent; that they referred to transactions that took place subsequent to the breach by the defendants. It appears from the record that objections were made to certain exhibits and not to others in evidence. To the exhibits to which no objections were made, the defendants cannot complain at this time. The opportunity was afforded at the time of the trial to object and the defendants not having done so, they cannot on appeal raise the question of the competency of such exhibits. As to the other exhibits in the record to which objections were made, the court does not find such error as would justify a reversal on the ground contended for by the defendants.

It is urged by the defendants that the verdict was a compromise verdict, for the reason that the amount was less than the evidence justified, and that the jury arrived at the verdict by splitting the difference between the amount claimed and the amount returned. If the verdict is for less than the plaintiffs' evidence shows they are entitled to, the defendants cannot complain. Jones v. Bates, 179 Ill. App. 578.

for the reasons indicated, this court is unable to find that the trial court erred, and therefore the judgment is affirmed.

APFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

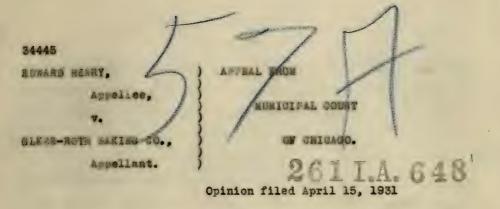
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ELECH, F.S. ARD CHIMN, J. COMOUN.



The plaintiff sued the defendant in the Municipal Court of Chicago for breach of an alleged contract. The case was tried before the court without a jury, and the finding of the court was for the plaintiff and judgment was entered against the defendant for \$173.35. This appeal is by the defendant.

The plaintiff filed his statement of claim on December 10, 1930, alleging that the defendant was indebted to him in the sum of \$162.35, for labor and material for plaster patching done by him for the defendant on september 17, 1926, and subsequent thereto, which sum the defendant had not paid to the plaintiff, although personally requested to do so; and that the defendant had vexatiously refused and neglected to pay said sum.

The defendant filed its affidavit of merits to the effect that it had a good defense; that the defendant did not employ or engage plaintiff to furnish any labor or material, nor to perform any work for the defendant at any time, and that the defendant was not indebted to the plaintiff.

It appears from the evidence that the defendant rented a certain space in a building known as No. 958 billow atrect, Chicago, Illinois, from Henry Noth, the owner; that the owner employed the Neff Construction Co. to remodel parts of the building not occupied by the defendant; that the plaintiff was a plastering contractor and was employed by the Neff Construction Co. to do



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It acres from the evidence that the defendant rented a certain space in a bediding known as No. 958 villow street, Chlouge, Illinois, from Danny Roth, the emery that the owner employed the Beff Jonetraution Co. to remodel parts of the bediding not securisd by the defendant; that the plaintiff was a minetering contractor and was employed by the helf Jonetrootion do. to do the plastering in the parts of the building being remodeled; that a gas explosion occurred on the floor above the premises occupied by the defendant and that some of the plastering in the defendant's premises was damaged and in need of repair.

The plaintiff testified that monroe Roth, the treasurer of the defendant corporation, directed him to repair the plastering which had been demaged in the defendant's premises; that he accordingly patched the plastering in the places demaged; that the value of the labor and material was \$162.25; that he sent bills to the defendant, and that the defendant refused to pay them, but offered him \$75.00 in full payment of the claim.

The evidence of the defendant is to the effect that Henry Roth, the owner of the building, directed the plaintiff to do the work and agreed to pay him a fair price therefor; that no contract was made with the plaintiff by the defendant, and that Henry Roth was responsible for the work and had refused to pay the plaintiff's bill only because the amount charged was excessive. It is undisputed that the plaintiff did the plastering work in question.

The question upon the facts was decided by the trial court, and in doing so it passed upon the weight of the evidence. The trial court being in a better position than this court to pass upon the credibility of the vitnesses who appeared and testified, we will not disburb the finding unless the judgment is against the manifest weight of the evidence, and upon careful consideration of the evidence, we are not disposed to reverse on that ground.

It is contended by the defendant that the plaintiff did not make proof of the amount of the labor and value of the materials used, except to testify that the amount and value of the work done and materials furnished was \$163.25.

The defendant's affidevit of merits does not raise the

the pleatoring in the party of the building being recodered; that a gas explanation occurred on the floor energy the precises complet by the defendant and thet uses of the pleatering in the defendant's promises were descendent in need of versity.

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The trial court had a sense of the court to the tribute and testified, as till not disturb the finding anless the judgment is equinat the factor of the evidence, and upon externi densideration of the evidence, we are not discount to reverse on that ground.

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the defendant's affidavit of marite does not raise the

issue that the amount sued for was excessive, but limits its defense to whether or not the defendant employed or engaged the plaintiff to perform any labor or furnish any material, or perform any work for the defendant at any time, and having limited the issue, it was too late to urge any defense not set forth in the affidavit of merits. Numbreys v. Greey, 200 Ill. App. 523.

It is also contended by the defendant that the court erred in adding [11.00 interest to the amount claimed, on the ground that the delay was vexatious. The work was completed on September 17, 1928, and the plaintiff was obliged to start suit on Jecember 10, 1939, after the plaintiff had submitted several bills for the work and labor performed and payment had been refused by the defendant.

Under the issue presented by the affidavit of merits a reasonable charge for the work and material was not in issue, and under the pleadings and evidence the trial court was justified in finding the issues for the plaintiff.

se find from the record that the trial court did not err in entering judgment for the plaintiff and against the defendant. The judgment is accordingly affirmed.

AFFIRMS C.

WILSON, P.J. AND FRIEND, J. CONGUR.

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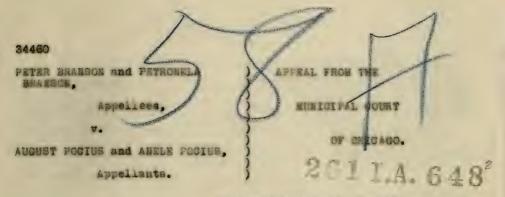
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The judgment is everyingly efficued.

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Opinion filed April 15, 1931

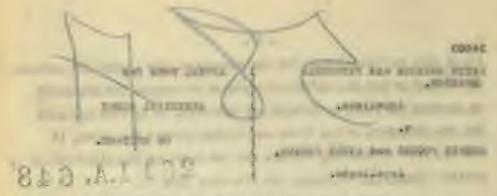
This is an appeal by the defendants from an order entered in the Municipal Court of Thicago on March 10, 1830, denying the motion of the defendants in the nature of a writ of error corse nobia, under Section 88, Chapter 110, Cabill's Ill. Nev.

Stats. to vacate a judgment entered on June 5, 1889.

The plaintiffs brought suit against the defendants in the Municipal Court. The case was at issue and set for trial on the jury calendar. On June 5, 1889, an ex parts judgment was entered against the defendants for the num of 18880. Thereafter the defendants made a motion and filed two petitions in the Municipal Court to set aside the judgment, and after filing the motion and the two petitions in question filed a bill in equity.

A desurrer was filed to said bill and sustained, after which the defendants filed a petition in the nature of a writ of error coras nobis in the Municipal Court, and thereafter, by leave of court, on January 20, 1930, filed an unended petition to the same effect.

The court before hearing evidence on the amended petition, produced from the parties a suiver of all formalities of pleadings. Evidence was tendered and heard for both parties, and thereafter the court entered an order denying the motion of the defendants.



Opinion file Anna Actif 11, 1071

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in the sunisivel Court. The ease one at 15 one and set for tried on the jury calculat. On June 2, 1872, an an party judgment we contered against the defendance for the was of 18850. Thereafter the defendance made a motion and thind two potitions in the squieties? Court to set welde the judgment, and after filling the motion and the ter petitions in question filled a bill in equity.

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The court before bearing evidence on the amended potter.

plendings. Syldedge one tendered and heard for both parties, and
thereafter the court entered an order denying the motion of the

It is the contention of the lefendants that the amended petition set up sufficient facts showing a default of the Clerk of the Municipal Court in failing to properly enter the order of the court continuing the case for trial until July 15, 1929, instead of June 5, 1929, on which laster date an ex parte judgment was entered.

The evidence on behalf of defendants is that Victor Frohlich is an attorney licensed to practice, and was the attorney for the defendants, although his appearance was not entered of record; that he was ill for several weeks prior to May 13, 1929, and confined to his home; that a short time prior to May 13, 1929 he called. Thomas J. Doyle, an attorney, and asked him to watch and take care of this case when it was reached for trial; that Boyle appeared in the Sunicipal Court on May 13, when the case was called, requested that it be continued by the sourt until July 15, 1929 and made a memorandum in his notebook of the date; that on July 15, 1929, the case was not on the court call; that Frohlich learned from the files in the case that an ex marks judgment was entered on June 5, 1929.

There is evidence to the effect that there was an erasure on the left hand side of the embelope containing the files. It also appears from the record that one Faul Edelstein testified, at the request of the plaintiffs, to the effect that he appeared in the Sunicipal Court on May 15, 1989; that he answered several other court calls, left the court room before the case was reached; returned later and found that the case was set for June 5, 1939. One Henry 5. Jacobs, an attorney who appeared for the plaintiffs on the trial, testified that on July 15, 1939, he examined the envelope on which there were marks, also what is called the half sheet, which was in the envelope and on which was kept a record of the orders in the case; that there was no mark, sign or any indication whatever that the case had been continued to July 15, 1929.

It is the continuing the destination of the descalants that the monded position are up conflictent facts should a default of the close of the continuing the case for trial until July 15, 1220, and the continuing the case for trial until July 18, 1220, and the continuing the case for trial until July 18, 1220, and the case for trial until July 18, 1220, and the case of the case for trial until July 18, 1220, and the case of the case for trial until July 18, 1220.

The evidence on behalf of delegants is that Vieter wrotten is an atterney plus and to previou, and sen the atterney for the defendants, although him provides, and sen the atterney for the defendants, although him provides and soft and all 13, 1979, and confined to his home; thus a short time prior to day 13, 1979 he called. Thomas J. Soyle, an atterney, and contact his to water and soft and soft that it be continued by the court matil July 15, 1973 and sude a memorandum in his notwheek of the deter that July 15, 1973 and sude a memorandum in his notwheek of the deter that hearth learned from the court soil; that trabiled learned from the court soil; that trabiled learned from the files.

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The Minute Clerk of the Municipal Sourt, sho was present and acted when the case was called and continued, was not called as a witness, nor was the record produced before the trial court.

The facts in evidence as to the date when the case was set for trial are disputed. Therefore, there is but one question for this court to pass upon, and that is, was the evidence, by its manifest weight, contrary to the order entered by the court?

This court has examined the record, and we are umble to find that the trial court erred in finding as it did. In determining the questions involved in this proceeding, we have considered the reasons offered by the trial court at the time of the entry of the order, but they are not of controlling importance, provided from the record the order was a proper one.

The trial court heard the matter on its merits as a question of fact, and entered on order denying the motion of the defendants, and there being no reversible error, this court till affirm the order danying the motion of the defendants to vacate the judgment.

ORDER AFFIRMED.

WILSON, P.J. AND PRIEND, J. CONCUR.

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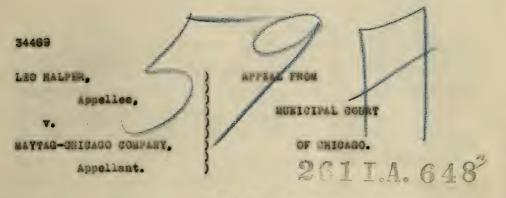
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CRUMP APPARENCE.

MILDON, 1.1. LES PRIERO, 3. SONCES.



Opinion filed April 15, 1931

This suit was filed in the Hunicipal Sourt of Chicago by the plaintiff against the defendant to recover the sum of \$250, for five months rent of the store located at 2446 west 47th Street, Chicago, alleged to have been rented and occupied by the defendant. The case was heard by the court, after a jury was waived, and at the conclusion of the trial a judgment was entered in favor of the plaintiff and against the defendant for this sum. The case is now in this court on appeal.

The store of the plaintiff was occupied by one Swarts, who was in charge for the defendant, after a Mr. Burch, renting egent for the defendant, stated to the plaintiff that the defendant company was going to put Swarts in the premises to run the store for the defendant.

The sum of \$50.00 was agreed upon as the monthly rental and the plaintiff was paid the June, 1827 rent, and Surch sent the plaintiff a check for the July rent, which was returned for want of sufficient funds. After Surch was notified of this fact he smiled defendant's check to the plaintiff, which was paid. The premises were occupied for a period of five months at a monthly rental of \$50.00, which was not paid. The Kaytag washing machines were in the store, and a large Maytag sign was displayed on the front of the building.



Opinion filed April 15, 1931

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This suit was filled in the sunicipal yours of Obicago

For five months rank of the store leanted at 2448 neat 47th Street,

Chicago, mileged to have been rented and occupied by the defendant.

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the case was hazed by the sourt, with a jury was saived, and at
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who was in charge for the defendant, after a Mr. Murch, recting agent for the defendant, aretal to the plaintiff that the defendant company as going to put Searts in the presises to run the store for the

The sum of 180.30 was agreed upon as the conthly rental
and the pinintiff was puld the June, 1827 rent, and Burch sant the
plaintiff a check for the July rent, which was returned for sant of
sufficient funds. After much was matified of this fast be malled
defendant's check to the pinintiff, which was puld. The precises
were compled for a veried of five months at a monthly rental of 180.00,
which was not pulm. The taying maching machines were in the atore,
and a large imptag alga was displayed on the front of the bailding.

The trial was commenced and continued after the close of the plaintiff's case, an action of the defendant's attorney, to February 27, 1930, and on that date the case was called for further hearing. The plaintiff was again called to the stand, over the objection of the defendant, and testified, in substance, that the officer to whom he talked and whose name he could not give at a previous hearing, was the President of the Company, and that his name is Charles Eratch.

The plaintiff further testified that when he was at the office of the defendant prior to the trial, Kratch told him that Swarts who was in possession of plaintiff's store, was a salesann and that Surch was the renting agent of the defendant.

The only evidence offered by the defendant is that of the auditor of the company, who testified that no checks were issued, and that no check payable to the plaintiff was returned.

dence was admitted on behalf of the plaintiff to the effect that a statement was made by Surch, in negotiating for a lease of the plaintiff's store, that he was the renting agent of the defendant, which statement could not bind the defendant. However, the admission of Eratch that Surch was the renting agent and that Swarts was a salesman of the defendant cures the objection of counsel and makes this evidence clearly competent.

Criticism of the action of the trial court is made by the defendant because of its denying an application by the defendant for a further continuance. The defendant claims that it was taken by surprise by the evidence offered on behalf of plaintiff at the continued hearing.

It appears from the record that the defendant's affidavit of merits raises an issue of the authority of Surch to rent the premises for and on behalf of the defendant, and that the defendant of the plaintiff's case, on sotion of the defendant's attorney, to beering. The plaintiff was remind to the stand, ever the objection of the defendant, and testilies, is substance, that the officer to show he telked and above name be could not give at a previous hearing, was the Previous hearing, was the Previous hearing, was the Previous hearing, and that his name

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margaine by the evidence offered on behalf of plaintiff at the

It appears from the record that the defendant's officed with a march to sent the devict of the defendant, and that the defendant content the defendant.

did not confirm or approve the lease. When the plaintiff testified in his own behalf at the first hearing, he stated that he called at defendant's place of business before the trial and talked to an official of the company, but upon objection by the defendant its objection was sustained, on the ground that the plaintiff could not identify the person by mase. He further testified at the continued hearing that he subsequently visited the same place of business and identified Kratch, who is the admitted president of the defendant company.

It is to be noted that the defendent asked and the court granted a continuance after the pleintiff offered evidence, and under the facts, the trial court cannot be charged with abuse of discretion in refusing to further continue this case. The issues were plain and it was the duty of the defendant to be prepared and offer its defense if it wished to do so.

court was prejudiced and biased against the defendant, and that it is relying upon the statement of the court at the first hearing that "according to this evidence the plaintiff is clearly entitled to a judgment." The court was justified in finding for the plaintiff upon this record. The court in finding for the plaintiff passed upon the credibility of the sitnesses and the weight of the evidence, and such finding is not against themanifest weight of the evidence. The rule is that in passing upon questions of fact where there is evidence from which the trial court could find for the plaintiff, it will not be disturbed, although the evidence may, in the opinion of the appellate Court, justify a different conclusion. T. S. & B. Ry.Co.v. Moore, Adams. 77 III. 317.

The defendant under the facts is liable for the leading of the premises and its occupancy, and for the amount due, and the court so found. We have examined the record and are satisfied that there is no reversible error.

Therefore, the judgment in this cause is affirmed.

AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

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MYRTLE F. SIMON.

Befendant in Error.

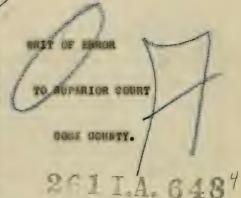
V.

and ISIDORE SIMOS,

Defendants.

ESWARD SINGER.

Plaintiff in arror.



Opinion filed April 15, 1931

EM. JUSTICE EXELL delivered the opinion of the court.

The plaintiff in error, Edward Singer, defendant below, brings the record in this case before this court on a writ of error.

The plaintiff brought suit in assumpsit in the Superior Sourt against the defendants, adward Singer, Edward L. Gross and Isidore Simon, for commission alleged to have been earned by her as a broker in procuring purchasers for certain real estate located in Chicago, Illinois, and offered for sale by the defendants. The plaintiff's claim was for \$11,000.

One of the defendants, Edward Singer, was served, and filed his plea of the general issue and an affidavit of merits, denying that he authorized the plaintiff to act as broker for him in procuring a purchaser for the real estate, and reciting that the defendant never promised to pay to the plaintiff any commission on the sale.

then the case was reached for trial, two defendents, Isidore Simon and Edward L. Gross, who had not been served by the sheriff, entered their written appearances, and consent to the entry of a judgment, which was objected to by the defendant Singer.

The plaintiff testified that she had a conversation with the three defendants in 1926, in regard to a buyer for the property involved; that she talked to Simon and Gross first and to Singer

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Opinion filed April 15, 1951

St. Justice class delivered the opinion of the court.

Stings the record in this case before this court on a rest of error.

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 later; that she told the defendant, Singer, the details of a deal she could make; that he thought the sale was a good one and told her to go ahead; that she procured the signing of a contract to purchase on December 28, 1936, embodying the terms discussed with Singer; that three or four days after the contract was signed, she told Singer the contract had been signed, and he said that he was glad; that after the signing of the contract plaintiff attended to the details of the surveying, the platting of the property, and in precuring the vacation of streets and alleys; and attended to the closing of the deal on October 26, 1927; that just before the deal was closed, the defendant insisted on taking part in the same, but the plaintiff stated that as long as she was being paid to take ours of it she would be able to close it alone.

The plaintiff further testified that she had no interest in the property, did not have any money invested in the same, and that the property had been purchased by Mr. Simon, one of the defendants, in 1935; that Gross and Singer, the other defendants, became interested in the property at the same time; that these three owned it during 1986, and thereafter; that at the time the details of the proposed sale were being discussed with Singer, the question of a commission was not mentioned.

It appears from plaintiff's evidence that she was a licensed real estate broker, and that she acted as the broker in this deal; that after the deal was closed, the defendant Singer said that he would not pay any commission.

bave any conversation with the plaintiff in regard to her acting as broker for the sale of the defendant's interest, but admitted that after the contract was signed he asked to be kept informed as to the deal and acquiesced to certain costs entailed in the deal.

levery that the toold the defendent, tinger, the details of a deal she could make that he thought the sele was a good one and told her to go ahead; that she procured the signing of a contract to purchase on secondar SS, 18th, emodying the terms discussed with Binger; that three or four days after the contract was signed, she told singer the contract had been signed, and he said that he was glad; that is of the curveying, the platting of the property, and in details of the curveying, the platting of the property, and in the contract of the curveying the platting of the property, and in the contract of the curveying the shie to close it alone.

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It accouse from picintiff's evidence that she need in the mover in this she need as the broker in this deal; that after the deal was closed, the defendant singer said that he would not pay tay commission.

 The defendant offered as his exhibit, a trust agreement dated December 1, 1825, actting forth that the trustee, the woodlawn Trust & Savings Bank took title to certain property, including the property involved in the instant suit, for the use and benefit of Edward L. Gross, Edward Singer and Isidore Simon.

The defendant further testified that he had no objection to the sale price, and that he had received his share out of the transaction.

at the close of plaintiff's evidence, Edward Singer moved the court to direct the jury to find for the defendant Singer, which motion was denied. Therespon he offered evidence in his behalf, and then at the close of all the evidence made a motion to the same effect, which motion was overruled. The jury returned a verdict against the defendants Isidore Simon, Edward L. Gross and Singer for the sum of \$5,500. Notions by the defendant Singer for a new triel and in arrest of judgment were made and overruled, and a judgment was entered for the amount of the verdict.

Defendant Singer urges: (1) that the court should not have permitted the appearance and consent of the defendants Simon and and Gross to a judgment to be filed; /(2) that as the action is a joint one against three defendants, a judgment cannot be entered unless the plaintiff proves a joint liability, and as no joint liability was established the judgment should be reversed.

We will take up the points in the order complained of by the defendant.

As to the first point, when the court allowed the two defendants Simon and Gross to enter their respective written appearances and consent to the judgment, which were presented before the commencement of the trial and filed in ept time, the court did what these parties defendant to the suit desired, which was proper.

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on the the court clies the point, when the court cliesed the two defendants Simon and trees to enter their respective written appearances and consent to the judgment, which were presented before the court and filed in apt time, the court did what these parties defendent to the suit desired, which was proper.

The defendant Singer was not bound by the consent of the other defendants to a judgment, and it was necessary to submit the evidence to a jury to decide the issues between the parties. No complaint is made that the jury was prejudiced, or that they returned a verdict against the defendants with knowledge that two of them had consented to a judgment.

As to the second point, the plaintiff's answer is to the effect that the question of joint liability cannot be raised at this time, for it was not preserved for review by reason of the failure of the defendant Singer to present written instructions to the court directing the jury to find for the defendant at the time the defendant's motion for a directed verdict was made at the close of all the evidence, and denied; and that the question as to whether the evidence did or did not tend to prove joint liability is not before this court; nor does it appear from the bill of exceptions that the defendant preserved any exceptions to the action of the court in overruling his motion for a directed verdict at the close of the evidence, or to the overruling of the motion for a new trial and in arrest of judgment.

sefore discussing these questions from the standpoint of the record, it will be well to have in mind the rules aunounced by the Supreme Sourt that apply and are controlling in disposing of these questions.

In the case of <u>Variety manf. Co.</u> v. <u>Landaker</u>, 227 Ill.

22. the court adopted and applied the rule, that failure to present with the defendant's motion for a directed verdict an instruction in writing directing the jury to find for the defendant did not, as a matter of law, preserve the question of the sufficiency of the evidence to sustain the verdict. To the same effect are the cases of <u>Mayville</u> v. <u>French</u>. 246 Ill. 454, and <u>Reiter</u> v. <u>Standard Scale Co.</u>, 237 Ill. 374.

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In the cure in the case of variety week, so, v. inmisher, TeV 111.

the cure in the defendant's motion for a directed verdict on incirnation in writing directing she jury to find for the defendant did not, as another of law, preserve the question of the sufficiency of the law.

Again, the Supreme Court announced and applied a rule in the case of <u>People</u> v. <u>Gabrys</u>, 389 Ill. 101, which is to the same effect, in these words:

"To permit a review of an order denying a motion for a new trial the bill of exceptions must show that such a motion ses made and the order of the court denying the same. The only method by which these questions can be preserved is by a bill of exceptions. (Gall v. Feuple, 201 III. 400; Harris v. Feuple, 130 id. 457.) In order to bring before this court for review the question of the sufficiency of the evidence to sustain the verdict it to necessary that the losing party make a motion for a new trial, and upon its being overruled except to Buth ruling, and to include such motion, the order everruling the same and exceptions thereto, together with the evidence, in a bill of exceptions. (Yarber v. Chicago and Alton Reilway Co. 235 III. 569.)"

A further rule is, the fact that the Clerk in writing up the record recited therein the making of these motions and the saving of exceptions, will not preserve the same for review.

**Bodonald v. The People, 222 III. 325; People v. Faulkner, 348 III. 158; **Test v. Franklin Fire Ins. Co. 345 III. 4pp. 184.

The record before us contains a bill of exceptions, and by referring to the abstract we find the following:

"Mr. Mills: Now comes the defendant, Edward Singer, at the close of all the evidence, and renews his motion for an instruction to the jury to find for the defendant at the close of the plaintiff's evidence and also moves for an instruction by the Court to the jury to find for the defendant at the close of all the evidence.

The Court: Motion denied; we will have more time on a motion for new trial and this can be presented to the Sourt."

and again:

"And thereupon the defendant, Edward Singer, by his counsel, entered his motion to set acide the verdict and to grant a new trial, which motion was denied by the Court.

And thereupon the defendant, Edward Singer, by his counsel,

and thereupon the defendant, Edward Singer, by his souncel, made a motion in arrest of judgment, which motion was over-ruled and denied by the Court.

And the Court thereupon entered judgment upon the verdict."

It is apparent from the bill of exceptions that the defendant, Singer, did not at the time the motion was made at the close of all the evidence, present a written instruction to the court

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It is everywhet from the bill of exceptions that the defendant, diager, did not not the time the notion was made at the class of all the wridenes, present a writern instruction to the court

to instruct the jury to find for the defendent; nor did the defendent, when the motions by him for a new trial and in arrest of judgment were made and denied, preserve any exceptions to such rulings of the court. It is to be noted from the record that instructions offered by the parties and marked given and refused are not incorporated therein. However, it appears from the abstract that instructions were read by the court to the jury. It further appears that the defendant not only failed to present a written instruction in support of his motion to find for the defendant, but also that he failed to except to the ruling of the court denying defendant's motions; and to except to the ruling of the court denying a new trial and the motion in arrest of judgment.

For the reasons stated, this defendant has failed to save for review the question of the sufficiency of the evidence to sustain the verdict.

Such a conclusion, of necessity, follows from the application of the law controlling the action of this court. It may be, however, that instructions given by the court to the jury have cured the errors complained of, and we may infer that the jury the was correctly instructed by the court upon/law applicable to the facts.

Finding no error in the record, the judgment is accordingly affirmed.

AFFIRWED.

WILSON, P.J. AND FRIEND, J. CONCUR.

to instruct the jury to find for the defendants nor did the defendants.

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ALUMBER STATE

SURGERT & COMPANY, a Corp.,

Appellant,

LESSON VICES

TAKE TIN MID

V.

MARYLAND BUILDING CORPORATION, et al.,

Appellees.

23 T T A

Opinion filed April 15, 1931

This is an ap eal by the complainant from a decree confirming the Report of a Master in Chancery and dismissing for want of equity a Bill to Foreclose a Mechanic's Lien up a the building and the land of the Maryland Building Corporation, one of the defendants, and to recover \$1512.14, of which \$1500.00 was a contract indebtedness, and \$12.14 was for extras claimed to be due from the defendants to the complainant.

The bill of complaint charges that the complainant entered into a written contract with one Louis Lipavski, doing business as the Englewood Merdware Company, to furnish finished h reserve to be used in the building of the Maryland building Corporation.

etance, that an December 8, 1937 it entered into a written contract with Louis Lipavski, doing business as the Englewood Mardon of Company to furnish finished hardware to be used in the building of the Maryland Building Corporation; that a id Louis Lipavsk, was the owner of the Englewood Mardware Company, and that he in turn had a contract with the Maryland Building Corporation to iurnish said hardware for the sum of \$1750, and that the hardware was delivered by the complainant under its contract and used in the building of the Maryland Building Corporation; that the contract price of the complainant was \$1500; that deliveries of the hardware were made

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W. Jurich Number delice and a series of the court,

This is a second of a Master in Chancery and dississing for confirming the deposition, one of the land suithing corporation, one of the land suithing corporation.

The bill of outplaint oberges that the complainant entered into a switten a contract with one louis hipswork, doing antered into a contract with a contract wi

stance, that on Becomber S, 1827 it entered hate a sritten contr of with louis lipsust, daing business is the Seglewick Hardware Concern to furnish limished hardware to be used in the building of the Maryland Building Corporation; that said Louis Ripsush; sae the owner of the Laglawed Hardware Company, and that he in turn had a contract with the Maryland Building Corporation to lumnish asid hardware for the sum of \$1200, and that the hardware a delivered by the complainst users its contract and used in the building of the Maryland Building Corporation that the contract of price of the

store when expectated out? In additionally four, provide new handal-liquide

between March 8 and 18, 1928, and that extra materials for the building were furnished by the complainant on May 18, 1928.

It is contended by the complainant that under Section 24, Chapter 82 of the Mechanic's Lien Act, a notice of claim of lien in the form of a letter was served by mail on Schiff Trust & Savings Bank, a corporation, by the complainant, which letter was dated February 24, 1928; that receipt of that notice in the form of a letter was acknowledged in writing on February 25, 1926, in a letter to the complainant written by the Schiff Trust & Savings Bank, a corporation, and that this was a substantial compliance with the requirements of Section 34 requiring a 60 day sub-contractor notice of lien.

The record disclosed that the Schiff Trust & Savings
Bank held title to the premises as trustee under the terms of a trust
deed in the nature of a mortgage from the Maryland Building Corporation.

With reference to the letter of complainant to the Schiff Trust & Savings Bank, it appears that the complainant was inquiring as to the credit standing of Sam Lipavski, who wished to guarantee the account of his son Louis Lipavski, doing business as the Englewood Hardware Company, and with whom the complainant had the bardware contract.

The complainant's contract with the Englewood Hardware Company makes it a sub-contractor, and it is not entitled to enforce a lien unless it complies with Section 34, Chapter 88 of the Mechanic's Lien Law, which section provides, in substance, that a sub-contractor must personally serve a written notice on the owner within 60 days after the completion of its contract, except that the notice shall be filed in the office of the Registrar where the land is registered under the provisions of an act concerning land titles, unless such notice is obviated by a sworn statement of the contractor to the owner, wherein the name of such sub-contractor and the amount due appears.

between March S and 13, 1938, and that extra miterials for the building were farmished by the noupletness on May 18, 1938.

It is contended by the completent that under Section

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sank, a corporation, by the consistent, which isters was dated

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STATEMENT OF THE PROPERTY OF T

with reference to the letter of complainant to the Schiff Truck & Savings Mank, it appears that the complainant may inquiring on to the credit standing of San Lipavail, who simbed to guarantee the account of his con Louis Lipavail, doing business as the Saulievaed Lucieure Company, and with whom the complainant had the hardward contract.

Company suites it a sub-nontractor, and it is not entitled to enforce a lion uniced it dompion at the section 26, shapter 52 of the Sectionic's Lion bar, which section provides, in substance, that a sub-contractor must personally serve a written motion on the owner within 60 days within the completion of the semicat, except that the notion chall be filed in the office of the Registrar where the land is such motion is contracted by a score statement of the contractor to the owner, wherein the second due

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The facts in evidence disclose that the complainant's name does not appear in the verified statement furnished the owner by the contractor. The statement is on a printed form, under the printed heading, "Finished Mardware." No name or amount appears. The complainant's name not appearing in the contractor's statement, the owner is not liable under Section 5 of the Mechanic's Lien Law, which is, in part, as follows:

"It shall be the duty of the contractor to give the owner, and the duty of the owner to require of the contractor, before the owner, or his agent, architect or superintendent, shall pay or cause to be paid " " a statement in writing, under oath or verified by affidavit, of the names of all parties furnishing meterials and labor, and of the amounts due or to become due each."

It is clear that the complainant did not within 60 days after the complation of its contract cause a written notice of its claim and the amount due, to be personally served on the owner, its agent, architect or superintendent in charge of the building, and in this case, because of such failure, the complainant is not entitled to enforce its lien for the amount of its contract.

the Schiff Trust & Savings Bank to be such a notice as is required under Section 34 of the Act; and again, it was not personally served upon the owner in the manner required by the law. The manner of service has been passed upon in the case of Agles v. Stolze humber Co. 260 Ill. App. 14, where the court says:

"The requirement of section 24 providing for service of personal notice of the character therein described upon the owner, or his agent, or architect, or superintendent in charge of work within 60 days from the completion of his work, are plain and sust be complied with in order to give the sub-contractor a mechanic's lien. Throgmorton v. Mosak, 245 Ill. App. 330."

Failure of the complainant to personally serve notice on the owner within 60 days after the last delivery of the finished

The facts in the verified statement furnished the countries of the constants of the constants and a special as a statement of the countries and a statement of the countries of

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The security demotions considered a letter addressed to under Section 36 of the Art; and again, it was not personally served upon the sense le the sense of the less been passed upon the sense of addressed the the sense ways:

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initure of the complainme to personally serve notice on the coner of the finited

hardware, deprived it of the right as a sub-contractor to a lien.

The fact that the owner had knowledge of its contract and the use

of its hardware, does not make the complainant an original contractor.

The Mechanic's Lien Law is to be strictly complied with, and the complainant in failing to comply with its provisions, is not within its terms, and, therefore, cannot enforce the lien contended for in this proceeding.

The decree of the Chancellor is affirmed.

AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

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34644

CHARLES E. CRAMAM.

Appellant,

V.

H. M. GAMMACK.

Appellee.

OLINCOLIN OCCUPY.

261 I.A. 649

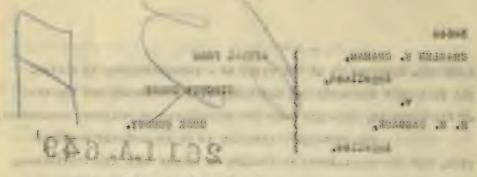
Opinion filed April 15, 1931

This is an appeal from a judgment entered in the Circuit Court of Cook County for the defendent and against the plaintiff for went of prosecution in a suit in assumpsit brought by Charels R. Craham, plaintiff, against R. R. Cammack, defendent.

On October 17, 1928, the plaintiff filed his declaration, consisting of four counts, together with a copy of the instrument sued on, and an affidavit of claim. On November 19, 1928, the defendant filed a plea of the general issue to all the counts of the declaration and an affidavit of merits.

On July 2, 1930, plaintiff moved to strike the affidavit of merits and for a judgment as in case of default, which
motion was demied. Thereupon the case was reached for trial and the
plaintiff persisted in his motion to strike the affidavit of merits
and for judgment as in case of default and elected to stand upon
said motion and refused to proceed further with the trial of the
cause. Thereupon the Sourt entered judgment for the defendant and
against the plaintiff for want of prosecution, from which judgment
this appeal is prosecuted.

The first count of the declaration alleges that plaintiff and defendant entered into a written contract on March 3, 1996, which contract is set out in hace verba; that plaintiff thereupon undertook and was diligently engaged in the performance of the



Opinion filed April 15, 1931

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on detains if it is placed in the place of the declaration, consisting of four sounts, together with a copy of the instrument sued on, and on allitavit of claim. On devember 18, 1882, the defendant filed a place of the general toque to all the counts of the declaration and an afridavit of merita.

On July 8, 1883, plaintiff soved to strike the siftday't of morite and for a judgment as in oses of default, which
motion was demied. Thereupon the case and resched for trial and the
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and motion and refused to proceed further with the trial of the
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against the plaintiff for must of procedution, from which judgment
this appeal is proceduted.

The first yount of the declaration alieges that picinthif and islandest antered into a written contract on haroh 2, 1984, which contract is set out in home recha; thes picintiff thereupon undertook and mes diligently sage, ad in the performance of the contract on his part, and expended the sum of \$5,000 in such performance, and the defendant, on March 18, 1986, notified the plaintiff that he withdrew, revoked and canceled the contract.

The second count alleges that the plaintiff and the defendant entered into a certain contract in writing at Chicago, Illinois, on March 3, 1996, which contract is set out in hace verba; that the plaintiff was the duly constituted and acting administrator of the estate of frank 8. Graham, deceased, and the duly constituted and acting guardian of Emeretta Ripp Graham, a person of unsound mind; that forthwith upon the execution of exid contract plaintiff undertook and was diligently engaged in furnishing and delivering to the defendant and his counsel all documents, etc; that on March 18, 1936, the defendant addressed a letter to the plaintiff, withdrawing, revoking and cancelling said contract on the alleged ground that the plaintiff was not lawfully authorized or empowered as administrator of the estate of Frank W. Graham, deceased, to sell or contract for the sale of personal property of said decedent.

The third count alleges that the defendant on Merch 18, 1926, became indebted to the plaintiff in the sum of \$5,000 on account of liquidated dumages because of defendant's repudiation of a certain written contract dated March 3, 1996.

The fourth count was a consolidated common count.

A copy of the written contract sued on was attached to the declaration.

The defendant's affidevit of merits recites that the plaintiff in his capabity as administrator of the estate of Frank W. Graham, deceased was never authorized or empowered by the court to execute the agreement dated March 3, 1926, and set forth in the plaintiff's claim, or to sell the personal property of said Frank W. Graham, deceased, upon the terms and conditions set forth; that the laws of the State of Missouri, within which state such appointment

contract on his part, and expended the sum of (5,000 in such per-

The third court sileyes that the defendant on dereb 18, 1926, became indebted to the plaintiff in the sum of \$5,000 on secount of lightheted demonst because of defendantia repudiation

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The defendant's affidavit of morita recites that the plaintiff in his expandity we administrator of the setute of Frenk 5. Traham, decembed who never subborized or empowered by the neury to excess the excessed the strenk of the setute of the personal property of said frank 1.

The transitions are for the terms and conditions set forth; that the land of the State of when the thing which state such account account and of the State of when the state such account account.

was made, expressly disabled an administrator from selling or contracting to sell personal property of his intestate except in accordance with the specific orders of the Court having jurisdiction over the administration of such estate; that the plaintiff in his capacity as administrator was in no manner bound by said agreement; that such agreement accordingly lacked mutuality, and that the plaintiff was at all times wholly unable to deliver goods, merchantable or reasonably satisfactory title to any of the real satate mentioned or described as belonging to Frank ». Graham, deceased.

The plaintiff asserts that the defendant's affidavit of serits does not state facts constituting a good defense to the cause of action set forth in the plaintiff's declaration and affidavit of claim.

The defendant contends that the dismissel of the plaintiff's case for want of prosecution was proper, and irrespective of any ruling on an interlocutory motion, the order appealed from should be affirmed; and if affirmed, the plaintiff is free to sue again if he chooses.

The question as to whether the order for a dismissal for want of prosecution was a final judgment will be determined from the order entered in this case, which is as follows:

"This cause coming on to be heard this day upon the motion of plaintiff, Charles E. Graham, by Markheim and Allie, his attorneys, to strike the affidavit of merits heretofore filed herein by the defendant, H. E. Cammack, and for judgment as in case of default by virtue of the statute in such case made and provided for the sum of Five Thousand Bollars (\$5,000), together with interest at the lawful rate from March 18, 1926;

Thereupon It is Ordered that said motion of plaintiff is

denied, to which order plaintiff excepts.

whereupon, this cause coming on further to be heard for trial, and plaintiff standing upon his motion to strike said affidavit of merits, and refusing to proceed further with the trial of the cause; It is Further Ordered that judgment be entered for the

It is Further Ordered that judgment be entered for the defendant and against the plaintiff for want of prosecution, at plaintiff's costs, to which judgment plaintiff excepts

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and prays an appeal, which appeal is hereby allowed upon plaintiff's filing an appeal bond in the sum of \$250.00 within sixty days and bill of exceptions within sixty days."

The contention is also made that the order is interlocutory and not final, but such contention is not supported by citation of authorities. The court, however, upon an examination of adjudicated cases. finds that the Supreme and Appellate Sourts, in cases analogous to the instant case, announce certain rules which are guides in the determination of this question and which are to the effect that the order must terminate and finally and completely dispose of the action. And if for the defendant, the judgment to be final must state that he is dismissed without day, or that the plaintiff take nothing by his suit. Bonneil v. Campbell, 143 Ill. App. 251; Harvey v. Cochran, 103 Ill. App. 576; Murdock, et al. v. The Calgary Colonization Co., 186 Ill. App. 232. In the case of The People v. The Board of Education, 236 Ill. 154, the Supreme Court in passing upon an order entered in that case determined that it was not a final appealable order, though it recites that the petitioner excepts to the ruling of the court and abides by his petition for mandamus, and that the defendants recover their costs from such petitioner; and quoted with approval from the oninion of the court in Chicago Portrait Co. v. Grayon Co., 217 Ill. 200. wherein the court said:

"The judgment was not final and the statute only authorizes appeals from final judgments. The Circuit Court merely sustained a desurrer to the declaration, and neither adjudged that the plaintiff take nothing by the writ or that the defendant go hence without day, and the judgment contained no words of equivalent meaning. There was no trial of any issue resulting in a finding for the defendant, as there was no issue to be tried and there was nothing in the nature of a determination of the rights of the parties. Such a judgment is not final."

Applying the rules referred to by the court in this opinion, there is but one conclusion to be reached, and that is that

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opinion, there is but one complicates to be remeiced, and mark in that

the order is not final and is not such as finally and completely disposes of this action; and further, it is not a judgment stating that the defendant is dismissed without day, or that the plaintiff takes nothing by his suit; but the substance of the order is, "that judgment be entered for the defendant and against the plaintiff for want of prosecution, at plaintiff's coats."

The record itself shows that the plaintiff's suit was dismissed for want of prosecution. It is not the record of a final judgment, and therefore this order is no bar to another suit for the same cause of action. Harvey v. Cochran, supra.

Having reached the conclusion that the judgment is not final, we have no jurisdiction to dispose of the other questions raised on appeal. Chicago Fortrait Co. v. Grayon Co., supra.,

This being an appeal from an interlocutory order, it must necessarily, and for the reasons indicated, be dismissed.

APPEAL DISMISSED.

WILSON, P.J. AND FRIEND, J. CONCUR.

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34656

THEODORS W. HAMRATH, et al.,

V.

WILLIAM LANGURY.

Appellant.

APPEAL PHON

CIRCUIT COURT

GOOK COUNTY.

261 I.A. 6492

Opinion filed April 15, 1931

This was an action in assumptit in the Circuit Court of Cook County to recover the unpaid installments under a contract of sale of a certain buminess owned by the plaintiffs known as the Surpass Table Mat Company. A verdict was returned for the plaintiffs in the sum of \$2500, and after motions for a new trial and in arrest of judgment, the court entered a judgment on the verdict, from which the defendant appeals.

The declaration consists of two counts, the first of which set forth the contract between the parties, and alleged that the defendant promised to pay in addition to other payments set forth in said contract, the sum of \$3500 in six equal consecutive seminannual payments. The second count was one of the common counts for goods sold and delivered. The declaration was varified by one of the plaintiffs. The defendant pleaded the general issue and filed an affidavit of series, which was afterwards amended by leave of court. As amended, it alleged several breaches of the contract of sele by the plaintiffs.

On the 16th day of December, 1925, the plaintiffs and the defendant entered into a written agreement, which provided, in substance, that the plaintiffs, father and son, being the owners of a manufacturing business known as Surpass Table Mat Company, agreed to sell and the defendant agreed to buy and take over said

TALES LINCE TERRETS OF SECURITS OF SECURITS OF SECURITS.

Opinion filed April 15, 1931

onle of a certain bunince comed by the plaintiffs known so the slaintiffs known so the sarpane Table Set Company. A vardict was returned for the plaintiffs of fudgment, the court ent on the vardict, from which of fudgment, the court ent on the vardict, from which intendent appeals.

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In the lith day of December, 1605, the plaintiffs and the defendant entered into a exitten agreement, which provided, in substance, that the plaintiffs, father and son, being the concret a substance, that the plaintiffs in the passes toble M t Company, of a manufacturing business known as furpase toble M t Company, agreed to may and toke over each

business under the name and style of Surpass Table Mat Company, including the good will thereof, and all of the machinery and equipment.

The contract of sale provided that the defendant was to pay over to the plaintiffs the sum of \$1,000, which was done; and in addition was to pay the sum of \$1,000 on January 15, 1926; the sum of \$500 on May 1, 1926, and the belance of \$3500 in six equal consecutive semi-annual payments, commencing on November 1, 1926, and that none of said payments were to bear interest.

The contract further provided that "failure on the part of the party of the second part to make such payments will automatically terminate the obligations of both parties hereunder."

contract, to-wit, that the plaintiffs had applications for patents pending covering the process of manufacturing said mats and that they would supply and deliver to the defendant all mats required by him in conducting his business; that said mats so to be delivered by the plaintiffs were to be on the basis of ten per cent above cost, and not in any event to exceed the price of \$1.70 per 36-inch mat in any width called for by the party of the second part not to exceed 48 inches and four cents per running inch thereafter, and that the plaintiffs agreed not to sell their patent rights covering said process or permit any other person to manufacture under said patent rights at any time hereafter.

From the evidence offered by the plaintiffs, it appears that Theodore *. Sanrath and his son, Theodore Manrath, Jr. were associated as co-partners in business at 355 Union Fark Court, manufacturing a special type of cork-insulated table pad. At the time of entering into the contract with the defendant Langert, the plaintiffs had a patent pending on said process in Machington. Prior to

business under the nume and style of curyons Toble Wet Company, in-

The contract of sale provided that the defendant was to pay over to the picintiffs the sam of \$1,000, which sad desc; and in addition was to pay the sam of \$1,000 on Jesuary 15, 1000; the sam of \$500 on May 1, 1000, and the balence of \$2000 in six count consoutive sections.

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pauding covering the unarces of meanfacturing maid mate and that they mould rapply and deliver to the defendent all mate required by him to conducting his imminent; that said mate as to be delivered by him the plaintiffs were to be on the basis of ten per cent above cost, and not in any aidth onlied for by the price of \$1.70 per Sürinch mat in any ridth called for by the party of the second part not to exceed the remains inch the exceed the trother and four sents per running inch thereafter; and that the process or paralle may ather persons to manufacture under anid patent.

From the svidence offered by the plaintiffs, it opposes to the the court, onese sessitated as oc-partners in business at TVS Walon fart Court, onese factoring a special type of corr-inculated table cod. At the time of tiffs had a patent positor on and process is tachington. Triog to

pecember 16, 1925, they had not received any notice of the rejection of the patent. After the contract was signed and delivered, the plaintiffs ran the business for the defendant for about a month; At the end of the month the defendant came in and took possession, and the plaintiffs moved out of the premises on June 20, 1926. In that six months' period the plaintiffs made interior parts of table mats, as called for in the contract on behalf of the defendant.

Langert the defendant paid \$2500 on the contract. In addition, the defendant paid the plaintiffs for some of the table mat interiors manufactured and delivered to him. On June 1, 1926, the plaintiffs refused to deliver to langert any more table nat interiors unless paid for C. O. D., as langert had failed to meet the installment notes for the balance of said purchase price of said business as the notes became due.

The physical assets turned over to the defendant at the time the contract was entered into, consisted of certain drying racks, pasting tables, glue boilers, packing benches, material racks, layout table, trimming machine, and other property necessary to carry on this particular manufacturing business.

In addition, it appears from the evidence offered by the plaintiffs that the defendant Langert, under oath, stated in an application for incorporation filed in Springfield, Illinois, in June, 1926, that the value of the fixtures he had secured from the plaintiffs was \$2,416.67; that he also listed the value of these fixtures with R. C. Dun & Company as \$2,983.53, and that after the final rejection of the plaintiffs' application for a patent, the defendant continued to make these table pads, using the same equipment that he took over from the plaintiffs, and the same process.

It is the contention of the defendant that by the express terms of the contract the executory obligations of both parties thereto were terminable at the will of the defendant; that the status

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of the contract of the premires on June 20, 1976. In that air

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In edition, it appears from the evidence offered by interesting the circuit of the sens equipment defendent continued to make these table pade, using the sens equipment to the took over from the plaintiffs, and the sense process.

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one need not be restored, and that this is not a case of rescission of a contract by the defendant for a breach on the part of the plaintiff, but is one which involved the exercise of a right under the contract to terminate it.

The answer of the plaintiffs to this contention is that an important function of the court is the enforcement of lawful contracts and the protection of contract rights. The court will not tolerate such an inequity as permitting one party to a contract to receive all the benefits of the same, and by the simple expedient of refusing to pay under the contract, terminate all his obligations to the other party. This court agrees that one of the functions of the courts is the enforcement of lawful contracts.

In order to construe the contract, which is the subject of this lawsuit, and determine its enforceability, we will determine from the document itself the intention of the parties when they entered into the agreement. From an examination thereof it appears that the provision.

"Failure on the part of the party of the second part/such payments will automatically terminate the obligations of both parties hereunder."

is a part of the contract. It will be noted that the contract does not fix a duration of time the same shall continue in force, except that the plaintiffs perpetually grant to the defendant the sole and exclusive right to sell mats in certain counties in the States of Michigan, Indiana, Wisconsin, Iowa and Illinois. Then, there is no maximum or minimum quantity of mats to be delivered to the defendant, the quantity to be supplied by the plaintiffs being all mats required by the defendant in conducting his business. Under this provision, the defendant might not require any mats if the business did not warrant it, or he might demand such large quantities that it would be wholly beyond the capacity of the plaintiffs to make delivery.

The quoted provision of the contract is but an expression

one need not be restored, and that this is not a cone of rectanism of a contract by the defendant for a break on the part of the plainthe methods to terminate it.

The received of continue rights. The contoution is that two of and the protection of continue rights. The court will not for the and the received to a contract to relate to a contract to relate to a contract to relate the size of the size of the tendinue to restract, terminate all his obligations to the size of the s

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The direction of time the sense shall continue in force, except then the plantified perpetually great to the defendant the sole and exclusive right to soil mate in certain counties in the States of Michigan, Indians, Maconsis, Ices and Illianis. Just, there is no sendans or minimus quantity of mote to be delivered to the defendant, the quantity to be obtained to the defendant to conducting his business. Index this provides of the defendant and require any mate if the business did not require any mate if the business did not retreat it, or he defends or he descent descriptions and here that it would be shally become in another that the sould be shally become does not the result of the contents of the result of the contents of the result of the contents of the relativity.

unique province of the contract is in a representant

of the law that applies to the rights of the parties under this contract, and would apply to its enforcement in the absence of such a provision.

There is no doubt, as we view the law, that the contract is void for want of mutuality. Where no time is fixed during which the contract is to continue in force, it is terminable at the will of the parties, and this right of the defendant to terminate was inserted in the contract by the parties.

In the case of <u>Jolist Bottling So.</u> v. <u>Brewing So.</u>, 254

Ill. 215, the court in its opinion passed upon a contract, and its

ruling in that case is applicable to the contract now under consideration. The court said:

"The only thing the contract bound appellant to do was to pay the price agreed upon and bottle the beer of appellee and to market the same as the product of appellee so long as it furnished beer satisfactory in quality and in such quantities as the trade demanded. No mention is made of any period of time the agreement should continue in force. No maximum or minimum quantity is stipulated in the agreement, but the quantity to be delivered is such a s shall be sufficient to supply appellant's demand. Under this provision appellant might demand a quantity so small as to make it impracticable for appellee to manufacture it, or it might demand such large quantities as to be rholly beyond the capacity of appellee. " " It cannot be doubted, we think, that the contract was unilateral and void for want of mutuality under represed decisions of this and other courts. (Vogel v. Pekoc, 157 111. 339; Migbie v. Rust, 311 id. 333; Mailey v. Austrian, 10 Minn. 535; Crane v. Crane & Co. 105 Fed. Rep. 869; Davie v. Lumbermen's Mining Co. 53 N. W. Rep. 625.) Furthermore, no time being fixed during which the agreement should continue in force, it was terminable at the will of either party. Davis v. Fidelity Fire Ins. Co. 208 Ill. 375; Orr v. Ward, 73 id. 318; Irish v. Dean, 39 Wis. 562."

In reply to the contention of the plaintiffs that it is an injustice for the defendant to keep and enjoy the benefits of the contract and escape its obligations to the plaintiffs, it is the duty of this court to apply the law in construing this contract, and that only. The cannot make a contract for the parties; we can only construct it.

What, if any remedy the plaintiffs have other than to recover under the provisions of the contract, is not before us at this time; nor is it necessary for us to advise the parties with

of the les that applies to the rights of the perties under this contract, and menid apply to its enforcement in the absence of such a

There is no doubt, to we view the iss, that the contract

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"You may thing the common bound would be he so to you will all the realism of her realistics to weed add added her sent severe subst and pare proof if an your as evidence in restors off as once out -ah about and an ordinatory down as him elitary at goods. Taid as al vilence median or souless di secut di suntince bische at twentile or or pillions of the phenomen and at befolight seled Junios affections attended to supply appetitude to the terminal temporary nd no disses so whitehes a beauth fifth Processon anishtony und right of the 171 westerfaces of realizable ter manufacture 17, while the circum constitute as to be while beyond its constitute of A CONTRACT OF STATE O STERRE AT MORE ATT MIT MIT SHEEL MATTER AT THE STORY TO STORY SOUTH name w course and the construction of the course of the co nerth which the saverent should couldness in tures, it was THE REPORT OF STATE OF SECOND PROPERTY SHAPE AN ASSESSMENT AND THE CON MODELLAND THE CAME AS MALE AND THE STATE THE STATE AND THE PARTY AND THE PARTY

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The state of the provisions of the applicable have other than to recover under the provisions of the applicable is not before us at this time; nor is it necessary for us to savise whe marties with

respect thereto.

For the reasons stated, the judgment is reversed and judgment entered here for the defendant at plaintiff's costs; and therefore it will not be necessary to pass upon the other questions in the record.

JUDILENT BEVERSED AND JUDILENT HE FOR DEFENDANT.

WILSON, P.J. AND FRIEND, J. CONCUR.

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WILLIAM SCHUKRAFT and MARGARET

Plaintiffs-Appellees,

V.

JOHN G. KRUTZLER and ROSIE ERUTZLER,

Defendants-Appellants.

APPEAL PROKE

MUNICIPAL COURT

OF CHIDAGO.

261 I.A. 649

Opinion filed May 13, 1931

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Plaintiffs, William Schukraft and Margaret J. Schukraft, his wife, obtained judgment by confession in the Municipal Court of Chicago against John G. Krutzler and Rosie Krutzler, his wife, defendants, for the sum of \$2,760, under a lease dated December 11, 1925. On motion of defendants the judgment was opened and the defendants given leave to defend. The cause was tried by the court without a jury, resulting in a finding for the plaintiffs and against the defendants for the sum of \$300, upon which finding judgment was entered and this appeal taken.

The lease in question was for a term running from January 1, 1986, until the 31st day of Becember, 1930, at a stipulated rental of \$28,500, payable in monthly installments. For the twelve months from January 1, 1926, until Becember 31, 1926, the monthly rental was \$275, and for the balance of the term up to and including Becember 31, 1930, the monthly rental was \$400.

about June 15, 1926, and paid the rent as it became due up until that time. Upon that date, defendants sold their business to one Hamill Engesser and Elizabeth Engesser, his pife, and a certain Wrs. Jordt, and at the time of the sale of the business made and executed a

Opinion filed May 13, 1931

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claintiffs, which to be describe and Margaret J. Schukrafs, his wife, contained judgment by confession is the smalelped Court of Whicego against John G. Krateler and Hoste Kruteler, his wife, defendants, for the sum of 12,760, under a lease dated December 11, 1255. On motion of defendants the judgment was agained and the defendants given leave to defend. The same was tried by the sourt without a jury, resulting in a flading for the plaintiffs and against the defendants for the one of 1200, upon which finding judgment was entered and this appeal taken.

The lease in question was for a term running from January 1, 1888, until the Blat day of December, 1870, whis attended rental of 188,500, payable in menthly installments. For the twelve and 188,500, payable in menthly installments. It is the control of 1878, and for the balance of the term up to and including rental and 1878, and for the balance of the term up to and including

Defendance kept the premiuse is question until on or about June 15, 1986, and paid the rent se it became due up until ther time. Upon that date, defendance sold their business to one Tentil Engageer and Minabeth Ingesoor, his sife, and a certain was, serdy, and at the time of the sele of the business and executed and at the time of the sele of the business and executed a

written assignment of the lease to the purchaser who, in turn, accepted the assignment in writing. A written consent of the plaintiffs, the owners of the premises, to the assignment of the lease was not obtained. Some evidence was introduced on the part of the defendants for the purpose of showing that there had been an assignment of the lease in writing, but, if there was such an instrument, it was not produced in evidence. Such evidence as there is relating to such a document, is of such an unsatisfactory character as to carry little weight. The fact that there was a written consent to the assignment was denied by the plaintiffs and the trial court was evidently of the opinion that it had not been proven.

the balance of the rent for the year 1998, was paid as it became due by the assignees, Engeneer and his wife, and these payments were made directly to the plaintiffs. From January 1, 1927, until the end of that year the assignees, Engeneer and his wife, mailed to the plaintiffs monthly checks for \$325 each and receipts were sent to the defendant at 933 fulton street, Chicago, Illinois, acknowledging the payments on account. January 1, 1928, the plaintiffs and the owners of the premises entered into a new lease with the Engessers, assignees of the defendants, and this suit was to recover the balance, amounting to \$900, due for rent for the period from January 1, 1927 until December 31, 1927, - this balance consisting of the difference between the amount of \$325 per month paid by the assignees under the lease and the rental of \$400 per month stipulated in the lease.

counsel for the defendants state as a ground for reversal that the acceptance of rent by the plaintiffs from defendants assigness after plaintiffs had knowledge of the assignment, constituted a consent to the assignment and a waiver of the provision requiring such consent to be in writing, citing Johnson v. sotel Lawrence Corp.,

written acaignment of the lease we the purchaser sho, in turn, accepted the mesignment is exiting, a written centent of the pistarisfs, the owners of the previous, to the scaignment of the lesse was not obtained. Some evidence was introduced on the part of the defendants for the purpose of showing that there had been an acaignment of the lease in writing, but, if there are such an instrument, it was less as does not describe the to such a does not that the fact that there are a written concert to each a does not that the fact that there are a written concert to each of the opinion that it had not been proven.

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Journal for the defendants state as a ground for reversal that the acceptance of rest by the picintiffs from defendants assignment, constitue assignment, constitue to the assignment.

337 Ill. 345, and other cases. These cases are not in point, but hold that adjacowledgment of the assignment by the owner and an acceptance of rent by him from the assignee precludes him, the owner, from declaring a forfeiture of the lease. It is also insisted that the acceptance by the plaintiff of a reduced rental from the defendants' assignees during the year 1937, operated to discharge defendants from liability under the lease. But, with this we can not agree. The acceptance of rent by the plaintiff from the Engessers, assignees of the defendants, did not operate to discharge the defendants. The Supreme Court of this state in the case of Grommes, et al. v. St. Paul Trust Co., et al., 147 Ill. 634, in passing upon a question very similar to the one at bar, lays down the rule under such circumstances as those involved in this case. The court in its opinion says:

"Nor did the sale of the saloon by the tenant to Ruse, nor the taking of possession by Ruse, nor the acceptance of rent from the latter by the landlord, operate as a discharge of the guarantors. The assignee of a leasehold estate is liable for the rent according to the terms of the lease, and the fact of his liability after the assignment does not discharge the lease from his covenant to pay rent. In case the rent is not said by the assignment as it becomes the the rent is not paid by the assignee as it becomes due, an action may be sustained against the lessee therefor; and it makes no difference, in this respect, that the lessor say have received rent from the assignee, and accepted him as tanant of the premises. (Shaw v. Partridge, 17 Vt. 626; 12 Am. & Eng. anc. of Law, page 739). where there is an express covenant to pay rent for a term of years, the mere acceptance of rent by the lessor from the assignee of the lessoe does not discharge the lessee. (Marris v. Meackman, 62 lows, 411). The contract of the latter continues in force, notwithstanding he may have parted with his interest in the estate, unless the lessor enters into such stipulations with the assignee, as to accept him as sole tenant and absolve the original lessee. If there be not a substitution of the assignee in place of the original lessee, and a clear intent to make a new contract with the former and to discharge the latter from further liability under the lease, both will be held liable to the leasor. (any v. Reed, 6 Allen. 364). Tood in his work on Landlord and Tenant says: 'An assignment of a lease by the lessee does not discharge either the lessee or his surety from the covenants. It does not have this effect even when the lessor recognizes the assignment by accepting rent from the assignee. (Way v. Reed, supra; Hunt v. Gardner, 39 N. J. Law, 530; Almy v. Greens, 13 N. I. 530; Damb v. Hoffman, 3 E.D. Smith, 361.) 337 111. 345, and other osses, these esses are not in polar, but hald that adjacyledgment of the assignment by the awar and an from declaring a forfeiture of the lease. It is also insisted that the acceptance by the plaintiff of a reduced rental from the defendance from liability under the lease. But, with this me can adfendance from liability under the lease. But, with this me can be to defendance from the lease of the decendants. The degree fourt of this otate in the case of the decendants. The degree fourt of this otate in the case of the last like and the last

"NOW THE THE METER OF THE MILESON BY THE TANKING THE THE dues, and the wester of possessing by suns, now the nessentance of year from the wester by the westers, approbe as a size the blacker of the commencers, the management of a language of the Language of for many duranglisms and warks williand his be read not has near all wroter the beatharder and much needed and agraduath the rest is not your day the sauteure as it because does an If has probated oursel and fundame hand that we you make a Sname as well and the same and the same as a same and the same as a same and the same as a same and the same a ment event and to weathfune and most county and at your he The contract of the Anthony or change in the season of the contract of the con he may have parted with the interest in the mante, unland in least of the section of the sestiment of content Contains and eviness has summe often as ald Spence at In wanty of complete any is multiplified a place of chief if buselone was a nim at rantal conte a has person. Innigire and rodyruh morn rossal ons in in in in in in in is the said in the said of the ysorus and we seemed and wedding of the survey ads med neve teelth side evan ton sec and more and the company of the company to the terms of the terms of the company 100 to 10

A surety for the tenent may set up, in defense to an action against him, any matter that operates as a discharge of the tenant from liability upon the lease. But the landlord must create a new tenancy by agreeing to accept the subtenant, or assignee of the lease, as his tenant, and by accepting such subtenant or assignee in substitution for the original lessee, before the latter will be discharged, and, by consequence, before the sureties of the latter will be discharged. Damb v. Moffman, 3 R. D. Smith, 361; 2 wood's land and Ten. secs. 470, 494, 495, pages 1063, 1084, 1178; white v. malker, 31 Ill. 423; mailev v. Delapline, 1 Sandf. 5; Grant v. Smith, 46 N. Y. 95). Where it is mutually agreed between parties that a lease shall be surrendered, and a new one is thereupon made with another party, and the landlord accepts the new party as his tenant, this will estop the landlord thereafter from denying the surrender of the first lease. (Dills v. Stobie, Sl Ill. 202; Williams v. Vanderbilt, 145 1d. 238.)

from the rule as expressed in the opinion of the Supreme Court in the case cited, it appears that there must have been a clear intent on the part of the owner of the premises to release the original lessee from further liability, and that unless such clear intent appears, the lessee will be liable under the lease.

The plaintiff, william Schukraft, testified that the receipts for rent were made out to Krutzler and the payments of \$325 were credited on account. In this he is supported by his bookkeeper who made out the receipts. Plaintiff also testified that he had a talk with Krutzler and informed him that the rent was being paid in a sum less than the amount in the lease and that he, the plaintiff, would hold the defendants for the difference. He further testified that he informed Krutzler, who had called to see him in regard to the lease and the payments thereunder, that he would not consent to an assignment because he did not know whether the new tenants were responsible.

From an examination of the testimony, we are of the opinion that there was no understanding between the parties which would amount to an agreement to substitute the Engessers for the defendants as tenants under the lesse. Moreover, the cause was tried

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once cited, it appears that there must have been a circu intent on the part of the owner of the premises to release the original lasses the part of the owner of the premises to release the original lasses.

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be had a fulk with Eretzier and informed him then the rent was being poid in a wes less than the nament it the less and that he, the plaintiff, would had the defendants for the difference. To further teeptified that he informed Eretzier, who had called to see him in regard to the lease and that he resid not regard to an accommon he did not know whether the new team.

From so examination of the testimony, we are of the interior of the could amount to an agreement to substitute the ingeneral for the could amount to an agreement to substitute the ingeneral for the could amount to an agreement to substitute the ingeneral for the could amount to an agreement to substitute the ingeneral for the could amount to an agreement to substitute the could be a considered and the conside

by the court without a jury and the trial court was in a much better position to observe the witnesses and weigh their testimony than would be this court, and we are not inclined to substitute our judgment for that of the trial court.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONGUR.

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CHARLES HORN, doing business as CHARLES HORN LUMBER COMPANY,

Appellee.

v.

JOHN BRENNAN, doing business as

Appellant.

APPRAL FROM

CIRCUIT COURT

GOOK COUNTY.

261 I.A. 649

Opinion filed May 13, 1931

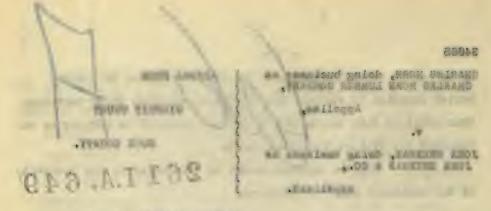
MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This was an action brought by Charles Horn, doing business as Charles Horn Lumber Company, plaintiff, against John Brennan, doing business as John Brennan & Co., defendant, to recover on certain alleged agreements under which the plaintiff sold and the defendant received, or agreed to receive, certain cars of lumber.

The cause naturally divides itself into two propositions:
The first involves the alleged wale of 4 certain cars of lumber to
the defendant which the defendant received and sold and failed to pay
for. These cars were M. & O. Car No. 22310, P. N. Car No. 7535,
O. B. & Q. Car No. 97148, C. & N. W. Car No. 131546. The invoices
bear different dates during the year 1934. The second proposition
deals with B. & O. Car No. 187059, bearing invoice date 3-16-27, which
was rejected by the defendant on delivery and afterwards sold at a
reduced price and defendant charged with the difference.

As to the first 4 cars, plaintiff claims that it was a sale and defendant insists that the cars were placed in defendant's yard on consignment. Each of the 4 cars was received by the defendant, together with an invoice showing the amount, description and price of the lumber.

Plaintiff testified that as to car No. 7535, a conversation was had between himself and the defendant by which it was agreed that the price was to be changed from \$84 per thousand feet



Opinion filed May 13, 1931

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This was an action brought by Charles Worn, doing tenders, to recover granes, doing business as John Granau & Co., defendant, to recover on sertain alleged agreements under which the pinintiff sold and the dofendant received, or agreed to receive, certain onto of lumber.

The first involves the elised sais of 6 sertein cars of lumber to
the defendant shick the defendant reserved and sold and failed to pay
for. These sars were . & O. for No. NARIO, r. M. Car No. 7885,
O. T. & G. Car No. 37168, C. & A. W. Car No. 181848. The involves
boar different dates during the year 1984. The second proposition
deals with S. & C. Car No. 187088, bearing involve date 8-16-27, which
was rejected by the defendant on delivery und aftenuards sold at a
reluced grice and defendant oberged with the difference.

is to the first 4 oras, plaintiff claims that it was a sale and defendent inmisses that the ours was received by the years on consignment. And of the 4 ours was received by the defendent, together with an invoice showing the amount, description and price of the lamber.

Plaintiff toutified that is to car Me. 7505, a conversation was had between biscelf and the defendant by which it was agreed that the price was to be changed from [96 per thousand feet. to \$83 per thousand feet. This was some time after the sale and just prior to February 1, 1926. The defendant in his testimony corroborates this evidence. It consequently appears that the price was agreed upon between the parties as to this car. As to the other cars the prices appear to have been fixed in the invoices.

and conversations between the parties as to the first 4 cars constituted a sale, but that the purchase price for said lumber was to be paid by the defendant to the plaintiff as the lumber was sold. At the time of the trial all of the lumber had been sold or disposed of, and the trial court correctly held that the defendant was liable for the purchase price and properly directed the jury to find for the plaintiff as to these 4 cars.

187059. It appears that when this car was delivered to the defendant it was rejected as unsatisfactory and was afterwards sold by the plaintiff to the Villa Fark Lumber Co., which company accepted the car and paid \$80 per thousand feet for the lumber. There was evidence that this \$80 per thousand feet was the fair reasonable value of the lumber at the time of the male to the Villa Park Lumber Co. The price of this car to the defendant was \$81 per thousand and there was in the car at the time 25,00% feet. The damage custained was the difference between the agreed price and the sale price, plus the demurrage and other charges. The jury found the issues as to this car in favor of the plaintiff and incorporated the damages in its verdict. No question is raised as to the amount of the verdict nor the amount of the damages proven and alleged to have been sustained by the plaintiff.

It is urged, however, that the court erred in admitting improper evidence on behalf of the plaintiff and in refusing to admit proper evidence on behalf of the defendant. We have examined the record

Ates this evidence. It consequently appears that the price was proced upon between the parties as to this car. As to the other cars the prices appear to have been fixed in the involves.

He are of the equation that the correspondence, involved as a less that the purchase erice for said lumber was to be paid by the defendant to the pinintiff us the lumber was sold. At the time of the trial all of the lumber had been sold or disposed of, and the time of the trial all of the lumber had been sold or disposed of, and the trial all the theory of the trial all the theory of the trial distance.

the second proposition has to do mish B. & S. Car po.

It supcess that this der when this der was delivered to the defendant
it was rejected as uncertisfactory and ses afterwards sold by the

Lotiff to the Ville fork immber Co., which company accepted the

O' the this 180 per thousand fort was the fair reasonable raige
of the lumber at the time of the saie to the Ville Fark Lumber to.

The price of this cor to the defendant was ill per thousand and there

difference between the syreed price and the saie price, plus the de
marrage and other charges. The jury found the issues as to this car

matrage and other charges. The jury found the issues as to this car

matrage and other charges. The jury found the issues as to this car

account the deserges proven and alieged to have been suntained by the

It is urged, however, that the court erred in admitting is shalt in relating to shalt in relating to shalt errors on behalf of the defendant. To have examined the record

end find there is only one question as to the admission of evidence on the part of the plaintiff which might have been objectionable. Plaintiff introduced in evidence the report made by the Oak Flooring Manufacturer's Association, made after an inspection of the car by one of its agents. That this inspection had been made was known to the defendant. The plaintiff testified that on one of his visits to see Mr. Srennen with regard to this car, he showed him, Brennan, the report, so that it would appear from the plaintiff's testimony that Mr. Brennan was familiar with its contents. The document was evidently shown to the defendant by the plaintiff for the purpose of convincing him of the quality of the lumber. A number of other witnesses testified as to the quality of the lumber, including the manager of the Villa Park Lumber Co. which purchased the lumber in question. This witness testified that he examined the lumber more particularly because it had been a rejected car. The document objected to would have been inadmissible in evidence if affered in substantiation of plaintiff's case without any other connection. But, if presented by the plaintiff to the defendant and discussed by them, it would become admissible as part of the discussion as to whether the lumber was of suitable grade. The association which made the inspection appears to have been an independent association, recognized by the trade, and its duties appear to have included the duty of inspection where disputes arose among members of the association or others engaged in the lumber business.

In view of the amount of testimony on this question by others, we do not believe that the error, if any, in admitting the document into evidence would constitute reversible error. We are of the opinion that a reversal of the cause, on account of the admission of this document in evidence, would result in no good purpose and that substantial justice requires affirmance of the judgment of the Circuit Court.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

and than there is only one question as to the elaiston of evidence on and sent of the plantage which depth been been objectively. tiff introduced in criticals the request wide by the Sal Plancing Edgetermer's descriping with a larger to describe of the car by that this importion had been made and bloom to one of the saunts. The ministry and in one on the tallifor Three of his while in AFRICANTAR BET see Mr. Brownen with request to this car, he showed him, Brownen, the teds promitted a tribule le off most recorde bloom th took or arrow. . . Grosses was familiar with its contests. The document was avito amorney and that That time not up an dealers and or empts whitever rentral and the such to the land and actions of the mid actionion of range territied as we doe condity of the lower, including the manager of the Villa Perk lamber Co. which purchased the lumber in quicking. This pignets tookelied that he somelyed the Lunber mays bedreigen durament soft uses destroying a smed limit it expensed glasticalares walfurful investigated in the available to although at although the entering the lion of paristiff's one differed may other parametion. Let, if presented by the plaintiff to the defeatest and discussed by those, in and sections ad an anti-manufact to fine as mailed and a second blues lucker wit of sulfaults grade, The secondaries which well the inye cariganar , a la dama a sadar sheli a da a come of a company their The trials, and the full manual to neve implant the cuty of largery eradic to cultivate and lo er does great them of could be de the a end in the inaber business.

In vice of the amount of testisony on this question by only re, we do not believe that the error, if any, in edulthing the two man in the vice of the cause, on account of the adviceion of the course of the cause of the properties of the Circuit chain at a justice requires affirmance of the judgment of the Circuit court.

to the court to tersons elated in this opinion, the judgment of the Classic Circuit Court is affirmed.

REMARKS AND PURCHASE AND PROPERTY.

34686

A. B. LIND.

(Plaintiff) Appellant,

V.

COLLETTA ELLSWORTH and MRS. M. ELLSWORTH.

(Defendants) Appellees.

PEAL PHON

MUNICIPAL COURT

OF CHICAGO.

261 I.A. 650'

Opinion filed May 13, 1931

MR. FRESIDING JUBITION WILMON delivered the opinion of the court.

Flaintiff, Lind, obtained judgment on a note by confess; ion in the Municipal Court against Colletta Elisworth and Mrs. M. Elisworth. Defendants filed their petition to vacate said judgment and be allowed to plead. The judgment was opened and defendants permitted to defend.

The affidavit of defense admits that the defendants executed and delivered to the plaintiff the note sued upon, and that Colletta Ellsworth was the maker and Nrs. Ellsworth the guarantor; charges the note was given for a loan and secured by a chattel mortgage on an automobile owned by Colletta Ellsworth. The affidavit further charges that nothing was owing to the plaintiff on said note, but, that on the other hand, the plaintiff was indebted to the defendant, Colletta Ellsworth, in the sum of \$363.92 because of money paid on account and for a balance due the defendant, Colletta Ellsworth, from the sale of the automobile, by plaintiff under the chattel mortgage.

The cause was heard by the court without a jury and resulted in a finding in favor of the defendants and judgment for both defendants in the amount of \$263.92. We are unable to conceive upon what theory the court entered judgment for both defendants, as the set-off was claimed by only one. The defendant, Mrs. Ellsworth,

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Opinion filed May 13, 1931

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The affiderit of anticle the the desire the the detected and their energies and delivered and delivered and delivered and delivered and selected the general contents illerated and selected the general contents of the point was given for a loan and secured by a chaptel more-further charges that nothing was owing to the plaintiff on said note. But, that on the other head, the plaintiff was indebted to the delendant, delicts existents, in the sum of 1363,80 becomes of mensy gaid on secount and for a mirane due the defendant, delicts calevoria, in the sum of defendant, delicts calevoria, in the sum of defendant, delicts on the suit of the antential plaintiff under the chattel mortgage.

defendents is the amount of TDC3. W. He are unside to conceive agented the chart theory the court entered judgment for both defendants, he the cat-off was cluimed by only one. The defendant, his. cliaworth.

only claimed as guarantor and could not, necessarily, be entitled to a judgment against the plaintiff.

It appears from the pleadings and the record that the action was brought by the plaintiff against two joint defendants and that a plea of set-off was filed by one. This is contrary to the rule. A debt to be set off must be mutual and between the parties to the record. Stuart v. Lott, 304 Ill. 170. There was no allegation in the affidavit of defense that the plaintiff was insolvent. The defendant, Colletta Ellsworth, was not entitled to the claim to set off, as the set-off was not one which was in favor of both defendants.

The Supreme Court of this state in the case of

Priest v. Dodsworth, 335 Ill. 613, in its opinion said:

"It is contended by defendants that the court erred in sustaining the desurrer to the third plea of J. R. Dodsworth. We think the plea clearly bad. It proposed to set off an individual demand of J. R. Dodsworth against the joint demand of the plaintiff against J. R. Dodsworth and L. G. Dodsworth. This is not permissible. Demands, to be the subject matter of set-off, must be mutual between all the parties to the action. (Dameier v. Bayor, 167 Ill. 547; Ryan v. Barger, 16 id. 28; 19 Ency. of Fl. & Fr. 757.)*

To the same effect see <u>Mameier</u> v. <u>Mayor</u>, 167 Ill. 547; <u>Bevier</u> v. <u>Morn</u>, 180 Ill. App. 547,

The court improperly admitted evidence of the set-off as it was not a defense mutual to both defendants.

for the reasons stated in this opinion the judgment of the Municipal Court is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL AND FRIEND, JJ. CONCUR.

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It appears from the plantiff applies the paint defendants and action was by applied the plant two paint defendants and that a plant of set-off sea files by one. This is contrary to the rule. A dobe to be set off cust se cutual and between the parties to the record. Stuart v. joit, 304 III. 1707. There was no clientien in the affidavit of before the plantity was incolvent. The defendant, collected III and included to the claim to set off, as the satisfied to the claim to set off, as

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The sourt in reperty admitted evidence of the set-off

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SUBSTRUCT ALVEROND AND CAUSE REMANDED.

NUSEL LED STRING, SS. COLORS.

34701

ADAM T. LEIB.

Appelles.

V.

LAMBRECHT CREAMERY, a Corporation,

Appeliant.

APPEAL FROM

TRIOC LATIONAU

OF CHICAGO.

261 I.A. 650

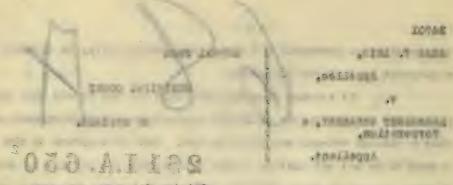
Opinion filed May 13, 1931

MA. FRESIDING JUSTICE TILBOR delivered the opinion of the court.

This is an appeal by the defendant, lambrocht Greamery, a Sorporation, from a judgment obtained against it by the plaintiff, Leib, for damages growing out of a collision between the truck of the defendant company and the automobile owned and operated by the plaintiff.

ear north on mannheim Road and the truck of the defendant was proceeding in an easterly direction along Lake Street, two intersecting streets. Lake street is a state road and about 15 feet to the south on Mannheim Road was the sign, "Stop State Road". Plaintiff testified that he was proceeding slowly along Mannheim Road before approaching Lake street, the place where the collision occurred, and stopped to change gears. There appears to be some question as to whether it could be gathered from his answers as to whether he stopped or not, but a fair interpretation appears to show that he stopped just long enough to shift his gours. Plaintiff testified further that he did not see the approaching truck of the defendant.

Day, the driver of the defendant's truck, testified that he was proceeding over and along bake street at about 30 miles an hour and that he saw the car of the plaintiff for the first time at about 100 feet south of bake street, coming down an incline on



Opinion filed May 13, 1931

MR. FURNISHE AR MICH WILLIAM delivered the opinion of

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out, he gethered from his namers as to whether he stopped or not,
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not see the expressing takes of the defendent.

Day, she driver of the defendent's truck, tentified that
he was proceeding over and along Loke erroot at about IO miles on
hour and that he see the er of the plaintiff for the first time at
about 100 feet south of loke street, coning form an incline on

Mannheim Road at a speed of about 40 miles an hour and that it increased its speed as it reached take street. His testimony is not corroborated by any other witness.

following that of the plaintiff and they testified that plaintiff was driving at about 15 miles an hour and going slowly before he reached take street, but they did not notice whether he stopped or not.

The jury returned a verdict in favor of the plaintiff and assessed his damages in the sum of \$400, upon which verdict judgment was entered.

counsel for the defendant contended that there was no proof of negligence on the part of the defendant and further that it was the duty of the plaintiff to stop at Lake street and that the driver of the defendant's truck had a right to presume that he would remain standing until defendant's truck passed. The evidence is conflicting as to whether or not plaintiff stopped at lake street, and this was a question of fact for the jury.

A case very similar to the one at bar is that of Roth v. Fleck, 342 lil. App. 396. In that case the plaintiff was driving south on Sheffield avenue and the defendant was driving west on Addison street. By an ordinance of the City of Chicago, Addison street was designated as a through traffic street and required vehicles approaching it along intersecting streets to stop before probeeding across. Plaintiff in that case testified that he stopped and looked but did not see defendant's automobile and was partly across the street when the accident occurred. The court in its opinion in that case said:

"Counsel for the defendant contend that there is no proof of negligence on the part of the defendant. The determination of that question depends upon the question whether the testimony on behalf of the plaintiff or the testimony on behalf of the defendant is to be believed. One of the controlling facts in issue is whether the plaintiff stopped fi fact and an action of about to been an been abedianout

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Two witnesses, school teachers, sows riding in a car fair in.

was driving at about it wiles on hour and going sienly before he reded to the contract of the c

The jury returned a verdict in fever of the plaintiff and encoured bis downger and the conservation of \$400, upon which verdict is an extend.

Counsel for the defendant contended that there was no many of sailing the country of the country that he aright to presume that he would remain attacking mutil defendant's truck passed. The evidence and this was a question of fact for the jury.

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as he approached Addison Street. On this issue the evidence is conflicting. In this state of the evidence we do not think that we should disturb the verdict. The rule is a familiar one that 'where there is a contrariety of evidence and the testimony by fair and reasonable intendment will authorize the verdict, even though it may be against the apparent veight of the evidence, a reviewing court will not set it aside. Carney v. Sheedy.

235 Ill. 76, 85. To the same effect are the following cases. Illinois Cent. R. So. v. Gillis, 62 Ill. 317, 313; Bradley v. Falmer, 192 Ill. 15, 83. It is hardly necessary to state that the finding of a court is entitled to the same weight and consideration as the verdict of a jury. Fisk v. Hopeing, 169 Ill. 105, 198.

We are referred by counsel for defendant to <u>Wantonya</u> v. <u>Tilbur lumber Co.</u>, 251 III. App. 364, but in that case the court found from the evidence that the defendant's truck not only failed to stop before attempting to cross the paved road, but proceeded to cross at a high rate of speed. Moreover, numerous instructions were given which necessitated a reversal of the cause. The other cases cited are distinguishable.

The question of negligence is one upon which a jury is eminently fitted to pass and, where the verdict is sustained by the judgment of the trial court, it will not be reversed on appeal unless the verdict and judgment are manifestly against the weight of the evidence. The trial court and the jurors had an opportunity of hearing and observing the witnesses when testifying, which we do not have.

It is insisted that the trial court erred in permitting the introduction of the repair bill, showing the repairs to the automobile of the plaintiff after the accident. This court in the case of Roth v. Fleck, 242 Ill. App. 396, already cited, held that the repair bill was competent.

This court in the case of <u>Gloyes</u> v. <u>Plantke</u>, 331 Ill. App. 183, in its opinion says:

"The evidence shows that the automobile was taken to a concern which was engaged in the business of repairing of automobiles; that plaintiff's car was then repaired by the garage company in the ordinary course of business; that the repairs made were those required as a result of the

ti successive and seed the contract to the contract to the contract to the contract to the contract and an area and the contractions were successive to the contract and an area contractions were

The question of wegilgenow is one upon which a jury the judysant of the trial court, it will not be reversed on appeal on the judysant of the trial court and the jurers had an appertunity of hearing and courting and courting and courting and courting and courting and courting the witnessee when tookifying, which we do not have.

it is included that the trial cours error in paraiting the included in the autothe introduction of the remain bill, cheming the regular to the automobile of the plaintiff affer the againent. This court in the case
of <u>rith</u> v. <u>light</u> has iii. App. 200, already sited, held that the

This court in the case of Clover w. Plante, TH III.

pp. 183, in its opicion sayo:

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collision; that the garage company presented its bill for the repairs to plaintiff which plaintiff paid. In these circumstances we think what plaintiff paid for the repairs was sufficient to warrant the recovery by him of such sum without any further evidence, since nothing appeared to cast suspicion on the transaction between plaintiff and the garage company, and, therefore, it will be presumed that the charge made was reasonable. Travis v. Pierson, 43 Ill. App. 579; Peabody v. Lynch, 184 Ill. App. 78; Coyne v. Eleveland, C. C. & St. L. Ry. Co., 208 Ill. App. 425; Atchison v. Stensbott, 14 30. 63. To the same effect are Johnson v. Canfield-Swigart Co., 202 Ill. 101; Sears, Roebuck Co. v. Ecars Slayton Lumber Co., 206 Ill. App. 387 (and cases there cited); Sudd v. Van Orden, 33 N. J. Eq. 143.

In the case at bar plaintiff testified that the whole side of his oar was crushed, and the door and lights broken. The oar was taken to Thomas T. Noskins Company, whose business was that of repairing automobiles; that they checked over the parts of the car that were damaged, fixed the ear up, and rendered a bill to plaintiff and that he paid it. There was no evidence on behalf of the defendant that the bill was unreasonable nor improper nor that there was any collusion between the plaintiff and the Hoskins Company. In accordance with the rule announced in Cloyes v. Plantke, supra, there was sufficient evidence to justify the court in admitting the paid bill in evidence.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

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our was taken to frome M. Nowins doment, whose business was that
of repairing automosiles; that they checked over the parts of the
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plaintiff and that he would it. There was no evidence on behalf of
the defendant that the bill we unreacounted nor improper nor that
there was sufficient wildence to justify the court in admitting the

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PERSONAL PRESENCE.

34713

MARTIN ROSEN and MORRIS GERTLER,

Appellants,

V.

RUSSEL CLARK, JACOB SARK, A. H. SHATFORD, K. A. NEYERS, J. F. CLARK, JR., JAMES DOKER, LUCINE VOORHIES, DAN LASER & JOSEPH A. MEYER, JR., trading as JOHN F. CLARK & GO.,

Appellees.

APPEAL FROM

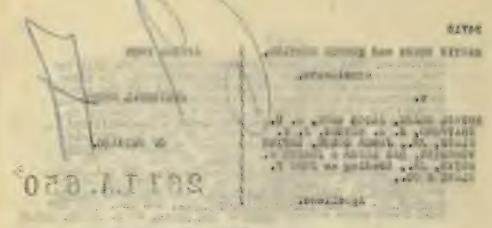
261 I.A. 650

Opinion filed May 13, 1931

MR. PRESIDING JUSTICE SILSON delivered the opinion of the court.

This was an action brought by Martin Rosen and Morris, Gertler, jointly, to recover \$2,866.75 from the defendants, Russel Clark, Jacob Mark, A. H. Shatford, K. A. Meyers, J. F. Clark, Jr., James Coker, Lucien Voorhies, Dan Laser & Joseph A. Meyer, Jr., trading as John F. Clark & Co. The cause was tried before the court without a jury, resulting in a finding in favor of the defendants and judgment upon the finding, from which judgment plaintiffs appeal to this court.

Gertler, had a joint account with the defendants, John F. Clark & Co. John F. Clark & Co. Were brokers dealing in stocks. Mosen testified that on Cotober 25, 1929, he was at the defendant's office and talked with a Mr. Mieferstein, who was an employee of the defendant, in regard to purchasing some stock and left a check for 1500.00, which was to be credited to the joint account of the plaintiffs. The withess testified further that he discussed with Mieferstein the proposition of buying certain shares of Montgomery Mard & Go. stock for his account and, on the following day, October 26th, he went to the defendants' office and gave Mr. Lieferstein an order to buy 15 shares of Montgomery Ward & Go. stock. On Saturday, October 26th,



Opinion filed May 15, 1931

MR. INSTITUTE STATES STANDE delivered the opinion of

This was an action brows by farths and a line in a line

From the facto that copens at the that plaintiffs, Rosen and Cortlor, had a joint second with the defendants, John F. Clark & Co. John F. Clark & Co. were brokers demiling in stocks. Nosen testified that on Cetober S5, 1983, he was at the defendants office and talked with a Mr. Lieferstein, who was an augleyer of the defendant, in regard to purchasing none stock and left a chook for (200.00, which was to be credited further that he discussed with dieferstein the ritheau testified further that he discussed with dieferstein the proposition of maying cartain shares of montgomery and & Co. stock for his account and, on the following day, October 18th, he sent to the defendants of solices and gave ar. Moferatein an order to buy 18 the defendants of Montgomery Mard & Co. stock. On Stories an order to buy 18 chares of Montgomery Mard & Co. stock. On Stories and order 18th,

he ascertained that the order had been executed and on Tuesday he found a telephone message from Mr. Kieferstein. Mosen stated he called Kieferstein on the 'phone and was asked for more mergin and then found out that Kieferstein had purchased 50 shares of Montgomery ward & Co. stock instead of 15 shares.

Plaintiff testified further that he refused to pay the defendants any additional money as a margin requirement to protect the account and that stocksdepreciated and the wontgomery ward & Co. stock was sold together with certain other stock belonging to plaintiff, as a result of which there was a loss of \$2,866.75.

Sol Wlish, a witness on behalf of the plaintiff, testis fied that he was with Rosen at the office of the defendants at the time of the talk with Rieferstein and he heard Rosen order 15 shares of Montgomery Ward & Co. stock.

Rieferstein, on behalf of the defendants, testified that the order was for 50 shares and that he made out the order at the time in writing, which order was introduced in evidence and shows a written memorandum for 50 shares of Montgomery ward & Do. charged to Gertler & Rosen.

The stock ledger account of the plaintiffs' carried on the books of the defendant company was introduced in evidence and shows a number of transactions during the year 1929, all of which are either in 100 or 50 share lots. The only cuestion is whether or not the order was for 15 or 50 shares.

Flaintiffs argue that the required additional margin of \$500 was not sufficient to cover 50 shares and indicated that the order was for only 15 shares. It appears, however, that there were other stocks held in the account which may have been sufficient to cover the margin requirements. Moreover, the memorandum of sale made at the time of the sale would clearly support defendants' theory of the case that the order was for 50 shares.

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defendents any additional concy as a margin requirement to protect the account and that atcohedeeproclated and the scontgomery ward & Co.

Sol Alish, a sitness on behalf of the pisintiff, testiffied that he was with Appen by the office of the defendants at the line of the defendants at the line of the testing of the second of designment for a specie.

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1830 was not sufficient to cover 50 shares and indicated that the order are for only is shares. It syperas, however, that there were other atooks held in the recount which may have been sufficient to cover the sangle results among the sensorandum of sale sade at the time of the sale sould clearly support defendance theory of the case that the order was ter 50 shares.

The court found that the plaintiffs had not proved their case by a preponderance of the evidence and we see no reason for disturbing the finding of the court. The court had the advantage of being able to observe the demesnor of the witnesses while upon the stand and was in a much better position to weigh their evidence than is a court of review.

It is insisted on behalf of the plaintiffs that the trial court erred in not granting plaintiffs a nonsuit. An examination of the record, however, discloses that no motion for a nonsuit was made. Buring the course of the argument counsel for the plaintiffs stated, "Still if your Honor feels that way I will take a nonsuit." This could hardly be held to be a motion for a nonsuit. It appears to have been dependent upon how the court felt about the matter. A motion of this character should not be equivocal and dependent upon some other fact or condition. If counsel for plaintiff had intended to take a nonsuit, it should have been done and not left dependent upon the feeling of the court. Even though the statement may have been considered as a motion nevertheless it was taken after the court had stated sufficient to apprise plaintiff as to what the finding of the court would be. Feiss, et al. v. Corn. 203 Ill. App. 261; Yudelson v. Tinterberg, 185 Ill. App. 454.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

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ANDREYS TERRORT.

STREET, AND PURCHES, AND OTHERS.

34451

ROBINSON REPRIORMATOR FORKS, a Corporation,

Appellee,

V.

WEST IND PINE BUILDING CORPORATION, a Corporation,

Appeliant.

MUNICIPAL COURT

OF CHICAGO.

261 I.A. 6504

Opinion filed May 13, 1931

This cause is now before us on rehearing granted. On January 15, 1930, the sunicipal Court of Chicago entered judgment by default against the defendant in the sum of \$1982.15. Execution issued thereon January 22, 1930. March 6, 1930, which was about fifty days after the rendition of the judgment, defendant filed a petition seeking to have the judgment vacated, the affidavit of merits, which had been stricken, reinstated and the cause set down for hearing. The court overruled the petition and this appeal is prosecuted to reverse that judgment.

The petition, after briefly stating facts purporting to constitute a meritorious defense, alleges an agreement between counsel for the continuance of the case, as a result of which the same was reset from January 8, 1930, to January 15, 1930, and that on the latter date, without further notice to defendant, the court struck its affidavit of merits and entered the judgment appealed from.

the one was/meritorious defense claimed by defendant, and the other was the failure of plaintiff's counsel to notify defendant of the date to which the cause had been continued. More than thirty days having expired after the judgment was entered, the court manifestly had lost jurisdiction of the cause, except as provided in Section 400, Chapter 37, Illinois R. S., which provides:

201 I.A. 650th

Opinion filed May 13, 1931

ishe ower is any perform an entered the spinion of the court, Junuary is, 1903, the same perform an entered judgment by Junuary is, 1903, the same performent of the same of 1903. Insoution is the same of the same of the same of the same in the same set that a judgment, defendent filed a judgment of the same set down for hearing. The had been siriled the petition and this apport is prosecuted to reverse that judgment, judgment.

The petinion, sites erietly stating facts jumporting to account to the same was the figure of the case, so a soult of which the same was the first of the contract of subject of morita and entered the judgment appealed from

the potition presented only two enters to the courty one segmentation defense distant by defendant, and the other was the failure of plaintiff's accused to notify defendant of the date to which the cause had seen continued. Note than thirty days having explicat after the judgment see entered, the court mentiently had lost jurisdiction of the cause, except an provided in section 400, Chapter 37, Illinois R. E., which provided:

"If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by bill in equity, or by a petition to the Municipal Court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity; providing, however, that all errors in fact in the proceedings in such case, might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside in the manner provided by law for similar cases in the direct Court."

This statute designates two grounds upon which a judgment of the Municipal Court may be set aside or vacated after the expiration of thirty days: (1) where the petition sets forth grounds which would be sufficient to cause the same to be vacated, set aside or modified by bill in equity; and (2) where errors in fact appear in the proceeding which might have been corrected at common law by writ of error coram nobis.

established in this state that the office of the writ of error coram nobis is to bring the attention of the court to, and obtain relief from, errors of fact such as the death of either party pending the suit and before judgment therein; or infancy, where the party was not properly represented by guardian; or coverture, where the common law disability still exists; or insanity, it seems at the time of the trial; or a valid defense existing in the facts of the case but which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake, these facts not appearing on the face of the record, and being such as if known in season, would have prevented the rendition and entry of the judgment questioned. (People v. Naonan, 276 Ill. 430). It is not contended in this proceeding that defendant's right to have the judgment set aside rests upon this provision of the statute.

Defendant's petition deals solely with matters which are contemplated under that portion of the statute affording relief

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tion of thirty days to enter the product after the expiration of thirty days: (1) where the perition cers forth grounds which would be sufficient to enter the same to be weened, see suide or the could be sufficient to enter the same to be weened, see suide or the could be sufficient to enter the same to be weened, see suide or

established in this state that the office of the erit of error corse nobis to to bring the attention of the sourt to, and obtain corse nobis to to bring the attention of the sourt to, and obtain ralief from, errors of fact such as the death of atther party pending the suit and before jud, sent therein; or intuncy, where the party conson its discollity represented by guardians or operature, where the conson its discollity still exists; or incentity, it seems at the time of the trial; or a valid defense existing in the facts of the time of the trial; or a valid defense existing in the facts of the exists when the man and or transmit, where there is an about and the record, and being such these facts not appearant of the record, and being such as if known in seemes, would have prevented the record, and being such as if known in seemes, would have prevented the reacts, and being such as if known in seemes, would have prevented the reacts, and being such as if known in seemes, would have prevented the reacts and entry in the contract of the reacts and antice.

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where grounds for vacating the judgment would be sufficient by bill in equity. We believe, however, that the various contentions made with reference to the subject matter of the petition upon this ground may be effectually disposed of by the fact that after the judgment was entered and execution issued, defendant waited for nearly fifty days, and beyond the time within which the court still had jurisdiction of the cause under the foregoing section of the statute to vacate the same, and that no excuse or justification for the delay appears in the petition.

In addition to the grounds urged by the petition for setting aside the judgment, it is now contended for the first time that the Municipal Court lacked jurisidiction to enter the judgment. This contention is based on plaintiff's statement of claim which sets forth the contract sued on, then alleges that plaintiff filed in the office of the clerk of the Municipal Court its claim for a mechanic's lien on defendant's property, and prays for a judgment on the lien "as is by statute provided" for the sum of \$1,983.15, together with interest thereon. Defendant asserts that the statement of claim shows on its face that this is a suit between the original contractor and the owner, to foreclose a lien, and not a proceeding under the mechanic's lien act, wherein the subcontractor's claim may be brought in an action at law in assumpsit jointly against the owner and the contractor, and that the judgment is therefore void for lack of jurisdiction of the subject matter.

This contention was not presented to the Municipal Court by defendent's petition nor was any question raised as to the sufficiency of the claim or the jurisdiction of the court to enter a judgment prior to the entry thereof. There is attached to plaintiff's statement a copy of the contract between the parties and the statement allegae that in pursuance of the contract plaintiff completed the the sum work upon which there is due/of \$1962.15. It is true that further

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This conjuntion was not presented to the funtained tourt by defendant's relition nor was any question raised as to the sufficienracy of the claim or the jurisdiction of the court to enter a judgsent prior to the early thereof. There is attached to plaintiff; statement a says of the contract between the parties and the statement

the sum

allegations are made with reference to the filing of a mechanic's lien for the same amount in the office of the clerk of the Circuit Sourt, and that the statement "prays for judgment on said mechanic's lion as is by statute provided, for the sum of \$1982.15". However. if that portion of the statement with reference to the mechanic's lien be regarded as surplusage, the statement still sufficiently sets forth a cause of action in assumpsit, upon which the judgment may rest. Under the authorities, pleadings are to be construed against the pleader prior to the entry of judgment, but after judgment a different rule applies, and the court will construe the pleadings upon which the judgment rests most liberally in favor of the pleader. It was so held in Roumbos v. City of Chicago, 332 Ill. 70, and Smith v. Nutledge, 332 Ill. 150. Therefore, we are not disposed to agree with defendant's contention that the court lacked jurisdiction to enter the judgment, and the same will accordingly be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

allegations are more with reference to the filling of a mechanica stanually and he armin and he smiller, and at common mean and rate model Court, and that the statement "prays for judgment on sold mechanic" a provided a Marketto near said out the interest of the or an ina chundon and of somereter did reserved out to motive tide the iles be regarded as survivence, the elatement still Perceptut, and dailer done addenness of makes to seem a frest area may rest, fuder the authorities, pischings are to be (...... region in Fig. duel processing the cuton mile of realist realistic and required ess a different rise applient and the sough pill assetue the to your air white white states are a state and a state of the state of the force of will the promise to take an executive product of the contract of the same of the contract of t der mit de genierent vill part till genierten vy gelan har gen begins from the total decidents of the brack that the course of bracking jurishes the anne ods has the judgment, and the anne of moistibility; .bownithe ad

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THE REAL PROPERTY AND ADDRESS OF THE PARTY O

a Corporation,

Appellee,

V.

WEST AND PINE BUILDING COMPONATION, a Corporation, Appellant. APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

261 I.A. 650⁴

Opinion filed March 11, 1931

On January 15, 1950, the Municipal Court of Chicago entered judgment by default against the defendant in the sum of [1982.15. Execution issued thereon January 22, 1930. March 6, 1930, which was about fifty days after the rendition of the judgment, defendant filed a petition seeking to have the judgment vacated, the affidavit of merits, which had been stricken, reinstated and the cause set down for hearing. The court overruled the petition and this appeal is prosecuted to reverse that judgment.

to constitute a meritorious defense, alleges an agreement between counsel for the continuance of the cause, as a result of which the same was re-set from January 8, 1930 to damuery 15, 1930, and that on the latter date, without further notice to defendant, the court struck its affidavit of merits and entered the judgment appealed from. We believe that the various contentions made with reference to the subject matter of the petition are effectually disposed of by the fact that after the judgment was entered and execution issued, defendant whited for nearly fifty days and beyond the time within which the court still had jurisdiction of the cause under Section 409, Chapter 37, Illinois Revised Statutes, to vacate the judgment.

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THE STREET

PARCIES BARR CON TOUR constantion, a serentian.

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THEORY LANGUAGES

Opinion filed March 11, 1931

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The potition, after brising electing facts surporting to constitute a meritorious defence, silemes an expensent between delie to flaces a se , some one to communicate out wel lemmes the same was newest from January S. 1930 to Samuery 15, 1930. and that on the inites dove, without larther notice to defeadung, -that odd herotes has stiren to five Ille sti noutle truce out ment repealed from. We believe that the verious contentions unde with reference to the autient metter of the potition are effectherein are from the first that ofter the independ to breeze value bad exceptive isomed, defoutest weited for mently fifty days asifoibalrup had ilite from add daids attile mais add happed has banism minist alonist . We reduced the melical relate means off to Distactor, to waste the judgment. The petition presented only two matters to the court; one was the scritorious defense claimed by defendent, and the other was the failure of plaintiff's counsel to notify defendent of the date to which the cause had been continued. Thirty days having expired after the judgment was entered, the court manifestly had lost jurisdiction of the cause except to correct such errors of fact in the proceeding as might have been corrected at common law by a writ of error coram nobis. (Sec. 409, Chap. 37, Ill. R. S.).

It is now urged by defendant for the first time that the aunicipal Court lacked jurisdiction to enter the judgment. This contention is based on plaintiff's statement of claim. which sets out the contract sued on; then alleges that plaintiff filed in the office of the Clerk of the Municipal Court its clair for a mechanic's lien on defendant's property, and prays for a judgment on the lien "as is by statute provided", for the sum of \$1982.15, together with interest thereon. Defendant argues that the statement of claim shows on its face that this is a suit between the original contractor and the owner to foreclose a lien and not a proceeding under the mechanic's lien act. whereint the sub-contractor's claim may be brought in an action at law in assumpsit jointly against the owner and the contractor. and that the judgment is therefore void for lack of jurisdiction of the subject matter. This contention was not presented to the Municipal Court by defendant's petition, and the question therefore arises whether the matter is properly before us.

without passing upon the merits of the jurisdictional question raised, we concur in defendant's contention that a judgment rendered by a court having no jurisdiction to hear and determine a cause may be raised at any time. (Sheahan v. Madigan.

The perition presented only ten matters to the court; one was the veritorious defense claimed by defendant, and the other was the inlines of plaintiff's counsel to notify defendant of the data to which the came had been continued. Thirty days to the data to which the came creept to correct.

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vithout manufug upon the merits of the jurisdictionel question raised, so commun in defendant's contention that a judgment vendered by a court having no jurisdiction to hour and determine a roung may be raised at any time. (Shemban v. mairem.

275 Ill. 372). However the matter must be properly presented to the reviewing court. The only basis upon which the Municipal Court may consider a motion to wacate a judgment after the expiration of thirty days is under the provisions of Section 21 of the Municipal Sourt Act. (Sec. 409, Chap. 37, Ill. R. S.). It has frequently been held that motions of this character do not become a part of the record unless they are made so by a bill of exceptions, and although the Clerk may include the motion and petition in the transcript of record, they cannot be considered. (Petton v. Young, 233 Ill. App. 515; Frackles v. Geheral Film Co., 189 Ill. App. 321; Domitski v. American Linseed Co., 321 Ill. 161.) In the case before us, although time was granted for filing the bill of exceptions, none was tendered or presented to the trial court to preserve the petition to vacate the judgment, nor any evidence that might have been heard by the court in considering the petition, nor the action of the court thereon. Consequently there is nothing properly before this court to furnish any basis for a conclusion adverse to the proceedings of the trial court. The judgment will therefore be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

275 III. 373). Horover the watter must be proceedy necessaria to the series and delde some also give all . the many the market of adt rec's inequiry a sense of notion a rebience you from expiration of whirty days to under the provintens of Section 21 of the Municipal Court Act. (Sec. 400, Chap. ST, III. 1. 1.). the drawmantly been held that motions of this character do a yd os shan ena yedt uselau buccou adt to trag a encoed ten bill of enceptions, and although the Glork any Include the donne yeds .broser to seizeement ade at meliting has notice be considered. (Person v. Young, 235 111. App. 515; Prochies su possent file Co., is fit, ion Ill; postent to sension to in the case before us, 101. 101. 101 the case before us, although time was granted for fitting the bill of exceptions, none was tendered or proceeded to the trial court to preserve the courses to reason the judgment, and any avidence of political have been beend by the court in considering the setition, nor the estion of the court thereon, Consequently there is nothing properly before this court to furnish any basic for a concluady . from adverse to the proceedings of the trial court. The heartite of eretered life tranglet

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ARTHUR J. LENMANN, a minor, by MARTHA LENMANN, his mother and next friend,

(Flaintiff) appellee,

V.

CITY OF CHICAGO, a Municipal Corporation,

(Defendant) Appellant.

APPEAL PROM

SUPERIOR COURT

COOK COUNTY.

2611A.6505

Openion filed May 13, 1931

AR. JUSTICE FRIEND delivered the opinion of the court. Arthur J. Lehmann, a minor, by Martha Lehmann, his mother and next friend, as plaintiff, brought suit against the City of Chicago in the Superior Court of Cook County, to recover damages for personal injuries, alleged to have been sustained by him as a result of a collision between an automobile in which he was riding on a public highway in Chicago, and a motor vehicle with three trailers attached thersto owned and operated by the defendant. Trial was had before the court and a jury, resulting in a verdict and judgment for plaintiff in the sum of \$2,000, from which this appeal is prosecuted.

The declaration consists of five counts, to which the defendant pleaded not guilty. The first count sets forth the statutory notice to the defendant, and alleges that plaintiff is a minor eight years of age; that while riding in an automobile at or near No. 3278-3284 Elston Avenue, a public highway in Chicago, and while in the exercise of due care and caution for his own safety, he was injured by a certain motor vehicle and trailers attached thereto, possessed, operated and maintained by defendant; that by reason of said motor vehicle being carelessly, negligently, wrongfully and improperly maintained and operated by defendant, the same was caused to and did run upon and against the automobile in

Openion filed May 13, 1931

MR. JUNIOR FRIEND Series of the course of the court.

isting of commons, a sinor, by Martha Lebenna, his mother and nest friend, so plaintiff, brought suit against the other and nest friend, so plaintiff, brought suit against the outer of the for personal injuries, alleged to have been sustained by his real to the common of the common

The decirration consists of five counts, to which the sets of the decirration to the defendent, and alleged that plaintiff is a minor eight years of ege; that while rising in an automobile at or near 80. 2370-3384 Elston Avenue, a public highway in shicego, and shile in the exercise of due care and caution for his own safety, he was injured by a certain motor vehicle and trailers attached thereto, possessed, operated and maintained by defendant; that by reason of said motor vehicle being carolecaly, negligently, arongtuity and improperly maintained and operated by defendant, the fully and improperly maintained and operated by defendant, the

which plaintiff was riding, resulting in his injuries. The second count alleges the negligence of the defendant in the operation of its said motor vehicle in that it failed to blow the horn or give some warning of its approach to the automobile in which plaintiff was riding, by reason whereof the collision ensued. The third count alleges excessive speed on the part of defendant, contrary to the statute. The fourth count alleges that defendant suddenly vecred to the left of the north bound part of the roadway without any warning on its part, and the fifth count charges that the driver of defendant's motor truck was in an intoxicated condition while operating same, as a result of which the said truck collided with the automobile in which plaintiff was riding.

Briefly stated the facts disclose that plaintiff was a passenger in a Dodge sedan, proceeding in a southeasterly direction on Elston avenue at a speed of about twenty or twenty-five miles per hour: that Edwin Johannes was driving the car with his wife, Harriet Johannes, sitting in the front seat; that plaintiff sat at the extreme left in the rear seat, immediately back of the driver next to his mother, Martha Lehmann, and that Walter Johannes sat at the extreme right in the rear seat, holding Ruth Lehmann, a child, on his lap; that it was a clear, dry, sunny day; that the Dodge sedan was proceeding partly on the south bound street car tracks along Elston Avenue: that defendant's truck with three trailers attached thereto was travelling on the north bound track, and suddenly swerved to the left as it approached the Bodge sedan, striking it right in the center, and that it kept pushing the Bodge sedan right up on the curb and against another car parked on the grass plot west of the curb.

It is contended on behalf of the defendant, (1) that there is no evidence in the record showing negligence on the part of the defendant; and (2) that the verdict and judgment are manite naid motor vehicle in that it failed to hier the bern or gave
some verning of its represent to the automostic in which plaintiff
mas riding, by reason whereaf the relitation enough. The third
count alleges excessive speed on the part of defendant, contrary
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It is esubsaided on behalf of the defendent, (1) that there is no evidence on the part of the defendent and (3) that the verdict and judgment are name.

festly excessive and out of all proportion to the injuries alleged to have been sustained by plaintiff.

by the sudden turn to the left of defendant's truck, as a result of which it struck the Dodge car, and plaintiff contends that this was the promimate cause of the accident. Defendant, however, contends that a Ford car, suddenly passing the truck on the right and proceeding in the same direction at considerable speed, struck the left front wheel of defendant's truck and deflected its course to the left just as the Dodge automobile was passing in the opposite direction in the south lane of traffic so as to cause the collision. Two witnesses called by defendant, Bartschmidt, the driver of the truck, and Henson, his helper, testified to this effect.

Manson stated that he was standing on the running board watching the trailers and as the Ford car came by had to jump up in the cab to avoid being struck. He then related the manner in which the left front wheel of the Ford caught the right front wheel of the truck and "three us over on one side". He further testified that the truck weighed approximately eight ton and each of the three trailers about 5600 pounds.

Bartschmidt testified that he had been a chauffeur for the city for nine years; that there was a governor on the motor limiting the speed thereof to ten or eleven miles an hour; that as they travelled in a northerly direction on Elston Avenue his helper suddenly jumped in along side of him, and as he did so a ford coupe caught the front wheel of the truck and "turned me over to the east side track" in which the Bodge car was coming from the north and that he hit the Bodge car just about in the center.

William Kaplan testified on behalf of plaintiff that he followed behind the Johannes car along Elston avenue, about 100 to 150 feet in the rear, and contemplated passing the Bodge car just footly everytive and out of all prepartion to the injuries alleged to have been succeived by plaintiff.

It moons to be sensed that the collision was sourced by the sudden turn to the left of defendant's truck, so a result of which it streak the Rodys our, and plaintiff equivalents that this that a ford our, suddenly possing the truck on the right and the left just as the Dodys sutemobile was possing in the opposite direction in the south lane of traffic as an to sound the oplicion. Two ettnesses called by defendant, darkschmidt, the driver of the truck, and hence, his helper, testified to this effect.

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which the left front which of the Ford onught the right front sheel of the trust and "three we over on saide". He further testined that the three that the the three trusters about 5600 pounds.

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limiting the speed thereof to ten or slover wiles so bour; that no limiting the speed thereof to ten or slove will not the stand of the second sught the front wheel of the truck and "turned me over to the east aids track" in which the lodge our was could from the north and that he hit the lodge our just shout in the senter.

filling Replan tentilled on behalf of plaintiff that the followed behalf the Johannes our slong Eleton Avenue, whose 100 to 100 feet in the rear, and contemplated passing the nedge our just

as the collision occurred; that he did not remember seeing the Ford testified to by defendant's witnesses nor any other car except the Dodge and defendant's truck.

Edwin Johannes, the driver of the automobile in which the plaintiff was riding, testified that he first observed the truck about 100 to 150 feet away, travelling at approximately the same speed as his automobile; that when he got within five feet thereof, without any warning, it suddenly swerved over and struck his car right in the center and kept on pushing it right toward the curb and against another car parked near by; that the Bodge came to a stop on the sidewalk with the Back truck right up against it; that the truck and trailers when they came to a standstill were strung across the street with the truck facing west; that he did not see the Ford testified to by defendant's witnesses.

Narriet Johannes' testimony was substantially the same as that of her husband, with reference to the manner in which the accident occurred. She further testified that the driver of the truck came to her after the collision and asked her whether she was hurt; that she smelled liquor on his breath and he appeared to be somewhat intoxicated.

It appears from the record that counsel for defendant in his opening statement to the jury stated that the Ford car referred to was driven by one Colvis Skinner and another young man who was with him, and manson testified that he took the names of the occupants of the car. Meither of these witnesses was produced upon the trial and no explanation was made of their absence. This fact, coupled with the improbability that a Ford coupe weighing less than a ton could swerve a motor train weighing over fifteen ton sufficiently out of its course to turn it west when it was going northwest, evidently led the jury to the conclusion that the proximate cause of the accident was the negligence of defendant's driver rather than

as the collision occurred; that he did not remember scring the Port testified to by defondant's virusees nor any other car every the

ne of the course of the state of the control of the driver of the accident occurred. The further testified that the driver of the course of th

If expert from the record that downerd for defendent to mean animal states of the company and who was to mean dativem by one tolds Skinner and saether young and who was with him, end dance toetified that he took the nemes of the ecoupants of the ear. Neither of these althoughes was produced upon the trial and no explanation are ands of their obsence. This fact, coupled with the improbability that a ford coupe weighing less than a ton and of the improbability that a ford coupe weighing less than a ton and if it may to the conclusion that the greatmate cause of the accident was the negligence of defendant's driver rather than the concident was the negligence of defendant's driver rather than

the deflection of the truck by the Ford car. It was held in Mannen v. Norrie, 338 Ill. 338, that:

"If the testimony of a witness is contrary to the laws of nature or universal human experience, so as to be incredible and beyond the limits of human belief, or if facts stated by the witness demonstrate the falsity of the testimony, the court is not bound to believe him."

The jury heard the witnesses and had an opportunity to determine their credibility and we are not disposed to disturb the verdict as being contrary to the manifest reight of the evidence.

with reference to the injuries, it appears from the record that plaintiff sustained injuries to his ribs, dorsal spine and pelvis. Plaintiff contends that he sustained a fracture of the illium, a portion of the pelvis. This is denied by defendants. It appears that two X-ray films were introduced in evidence. They were not certified to this court for our inspection, however, and where the record shows the introduction of evidence which does not appear in the bill of exceptions, we must presume that the same tended to sustain the verdict. It was so held in <u>People</u> v. <u>Niehoff</u>, 366 Ill. 103, and <u>Hehfuss</u> v. <u>Bill</u>, 343 Ill. 140.

Martha Lehman, plaintiff's mother, testified that after the accident Arthur was taken to the North Avenue Hospital where they placed him in a cast in bed; that he remained at the hospital for a week and was then taken home in a cab, where he remained another two weeks before the cast was removed; that subsequent to the removal of the cast he had to stay in bed for four weeks, being unable to walk; that thereafter he was able to sit up in a chair for another four weeks before he was able to walk; that he was thus incapacitated for more than two months. She testified further that before the accident Arthur was well and strong, and had never been injured before, but that subsequent thereto she noticed that he "kind of drags one foot", and when the weather changes he seems to become exhausted."

the deflection of the truck by the Ford cer. It was held in

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With reference to the injuries, it opposed from the sustained that plaintist contends injuries to his tibe, dorsed spine and polvis. Flaintist contends that he sustained a fracture of the illium, a portion of the polvie. This is denied by defendants. It appears that two X-rey films were introduced in evidence. They see many that two X-rey films were introduced in evidence. They have the resure also the content of the content of the resure also the content of the

the accident arthur was taken to the North Avenue Noeplaal where they placed him in a cast is bed; that he remained at the hospital for a rock and was then taken home in a cab, where he remained another two weeks before the cast was removed; that subsequent to the removal of the sust he had to stay in bed for four works, being unable to walk; then theresiter he was able to sit up in a shair for enother four works before he was able to walk; that he was thus in a star in the second that he could before the accident irthur was rell and strong, and had never been injured before, but that aubsequent thereto she noticed that he become to become exhausted."

There is no doubt from the evidence that plaintiff was severely injured and in view of the testimony we do not regard the verdict of \$2,000 as being excessive.

For the reasons stated the verdict of the trial court will be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

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COMMON A A COMMON CASE AND ADDRESS.

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WILLIAM H. MC FADDEN.

appellant,

V.

IN RE ESTATE OF KATHERINE E. SWIFT, Deceased.

Appellee.

APPEAL FROM

DIAGUIT COURT

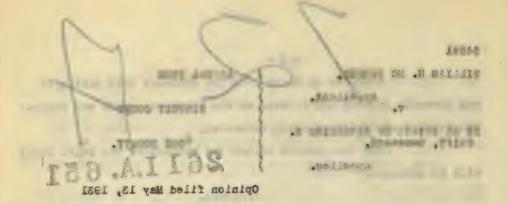
COOK COUNTY.

6011.A. 651

Opinion filed May 13, 1931

william H. McFadden filed his claim in the Probate of Court of Cook County for board, room and personal services sttendant rendered to K therine E. Swift, deceased, from February 26, 1923 to February 6, 1927, being 202 weeks at the weekly rate of \$30, making a total of 26060. On trial before the Probate Court the claim was disallowed. Thereupon the claimant appealed to the Circuit Court of Cook County where the cause was tried de novo before the court and a jury, upon stipulation of the parties that the transcript of the testimony taken in the Probate Court should be used as testimony in the Circuit Court. At the conclusion of all the evidence the court directed a verdict in favor of defendant and entered judgment, from which this appeal is prosecuted.

personal service was rendered to the deceased, as alleged in the statement of claim, nor is there any reliance upon an express contract between the parties. The claim is founded upon an implied contract arising from the relationship of the parties and the fact that deceased resided in claimant's household for a period of approximately three years. To support his claim evidence was offered on behalf of claimant to prove that he and the deceased were not blood relations; that deceased lived in his home for the stated period, and that the reasonable value of her board and room was \$30 per week. All of these facts are readily admitted to be true by defendant, and it is



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rendered to Ertherine B. Satit, deceased, from february 56, 1208

to February 6, 1237, being 502 seeks at the reckiy rate of 130,

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conceded that from the proof thus made there arises an implied contract for services between the parties and a presumption of an agreement on the part of the deceased to pay the reasonable value of such services. However, this presumption is a mere legal conclusion arising from the relationship of the parties and the attendant circumstances, and may be rebutted by other evidence. (In re let. of Dedmore, 267 Ill. App. 518; seger v. Robinson-N ash So., 340 Ill. 81.)

To rebut the presumption thus raised, defendant proved by competent witnesses that while Mrs. Swift lived in the McFadden household, she regularly paid \$7.50 each week toward the maid's salary of \$15, purchased groceries and supplies for use in the household, vaited on the table, helped wash dishes and otherwise assisted in the work of the house. These facts likewise are uncontradicted.

In rebuttal claimant offered the testimony of John %.

Woods, who stated that while McFadden was absent from the city in

September, 1926, Mrs. Swift came over to McFadden's place of business
to get some money from the witness, who was there employed, with
which to run the household; that in the course of the conversation
Woods said to her, "that is a pretty expensive flat over there, it
costs a lot of money to run it", to which Mrs. Swift replied, "yes,
it ain't costing me anything now, but I am going to take care of
it later on."

It thus appears that the essential facts of the case are uncontradicted. The parties proceeded upon entirely different theories. Claimant relied on an implied contract. To overcome the presumption raised by claimant's evidence, defendant proved that the deceased paid her share of the household expenses under a cooperative plan. This evidence was not offered to show payment or part payment under claimant's theory; it was offered to rebut the

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presumption of an implied contract and to prove an entirely different arrangement between the parties, under which are. Swift entirely acquitted her obligation to claimant. Since the defendant admitted the facts upon which claimant's case is founded and made proof of its defense by evidence that is uncontradicted, no question of fact was left for the jury's consideration, unless it can be said that Woods' rebuttal evidence raised a question of fact. As to this, we are of the opinion that Woods' testimony does not tend to support claimant's position. Loose expressions such as his, attributed to the deceased, and indicative of the terms of a contract, are an insufficient basis for submission to a jury from which to find that such a contract in fact existed. (Smith v. Birdsall, 106 Ill, App. 264, citing Ulrich v. Arnold, 120 Pa. St. 170; Collar v. Patterson, 137 Ill. 403.)

As we view the case, the presumption raised by the relationship of the parties was a mere begal conclusion, which could not be treated as evidence nor weighed in the scale against evidence, and that as soon as defendant submitted its defense based upon facts that are uncontradicted, and entirely inconsistent with claimant's theory of an implied contract, the presumption of an agreement between the parties vanished entirely. (Osborne v. Osborne 325 Ill. 229; Weger v. Robinson-Mash Co., Supra; Lohr v. H. Barkman Cartage Co. 335 Ill. 335.)

Claimant thus failed to support its claim upon the theory of an implied contract, and there being no contention made that an express contract existed between the parties and no proof in the record to sustain such a claim, we believe the court properly instructed the jury as a matter of law to find for the defendant.

For the reasons stated the judgment of the Circuit Court will be affirmed.

AFFIRMED.

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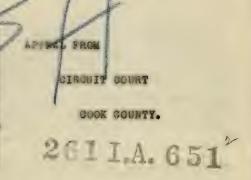
SAM PAPAS and ANGELOS RENTAS, doing business as ROYAL RESTAURANT,

(Complainants) Appellees,

V.

JAMES STASINOS and NICHOLAS STASINOS.

(Defendants) Appellants.



Opinion filed May 13, 1931

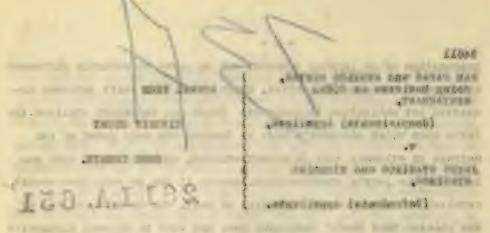
MR. JUSTICE FRIEND delivered the opinion of the court.

Sam Papes and Angelos Rentas conducting a rectaurant in the City of Chicago under the name of Royal Restaurant, filed their bill of complaint in the direuit Sourt of Cook Sounty, subsequently amended, alleging that they were tenents of James Stasinos under a written indenture of lease expiring on September 30, 1934, and containing the following provision:

"Lessor agrees not to rent any other store in this building for restaurant purposes or light luncheons."

The amended bill alleged that Nicholas Stasinos and Arthur Spaneles, as tenants of James Stasinos in the same building as that occupied by complainants, were conducting a confectionery store known as "Keystone Candies, Ice Cream", in which they were selling sandwiches, pie and other food and light lunches in connection with their business, and prayed for an injunction restraining the defendants from violating the foregoing covenant in said lease.

Answers were filed to the amended bill, and the cause referred to a master in chancery, who found that Nicholas Stasinos, a brother of James Stasinos, and arthur Spaneles were the owners of the restaurant and light luncheon business complained of, and recommended that a decree be entered restraining them from conducting said business, and that James Stasinos be restrained until Systember 30, 1934, or so long as complainants or their assigns should remain



Opinion filed May 13, 1931

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tenants in possession of part of said building under the indenture of lease mentioned in the amended bill of complaint, from renting any part of the building to any person, firm or corporation for use as a light luncheon or restaurant business. The court approved the master's report and entered a decree on December 18, 1929, granting a permanent injunction.

On February 25, 1930, complainants filed a petition for a rule on James Stasinos and Nicholas Stasinos to show cause why they should not be punished for contempt of court for violation of the decree entered by the chancellor, alleging that the injunction theretofore issued had been violated by the sale of lunches on the premises of Nicholas Stasinos and Arthur Spaneles. On the return day of the rule James Stasinos and Nicholas Stasinos filed their joint answers averring that Nicholas Stasinos and Arthur Spaneles had sold, assigned and transferred their business to James Stasinos, and that Nicholas Stasinos was then an employee of James Stasinos. When the petition for the rule and the answers thereto came on for hearing, no counter affidavits were filed and no testimony was heard before the chancellor, who upon consideration of the petition and answers and statements made by counsel, entered the following order:

"It is therefore ordered by this court that the said defendants, James Stasinos and Nicholas Stasinos, comply with the said decree aforesaid and cease all violation thereof and stop the conduct of the light luncheon and restaurant business in the store at the southeast corner of Austin Avenue and West North avenue, Chicago, Illinois, within two days."

from which an appeal is prosecuted to this court.

Counsel by their briefs have raised numerous questions of law with reference to the propriety of the court's order, based upon the validity of the covenant contained in the lease and findings of the decretal order and they seek to have us pass upon the merits of these contentions.

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a rule on James Studines and Michael Starines to show course why they should not be runiched for contempt of court for violation of the decree entered by the chancellor, alleging that the injunction is a decree entered by the chancellor, alleging that the injunction is a decree entered by the chancellor, alleging the injunction of the rule James State and the face State and their business to jones Statines, and that Michael State and their business to jones Statines, when the petition for the rule and the anglese of Inges Statines, when the petition for the upon consideration of the petition and bester the should no teetimony and heard bester the shanceller, who upon consideration of the petition and massers and statements made by souncel, entered the fallowing entered and statements and statements.

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Inasmuch, however, as the order holding the defendants in contempt of court and directing them to cease violating the injunction within two days imposed no fine nor contained any provision for committment of either of the defendants to jail by reason of the contempt which the chancellor found to exist, we are of the opinion that the appeal should be dismissed.

An order lacking the element of directing punishment either by fine or imprisonment is merely interlocutory, and is not a final order or judgment of committment. (Molven v. Molven, 55 Ill. App. 340. Sercomb v. Catlin, 25 Ill. App. 194.) The whole force of the chancellor's order was to direct defendants to cease all viblation of the injunction theretofore entered, and to stop the conduct of the restaurant conducted by them, within two days thereafter It provides for no punishment of the defendants either by fine or imprisonment, and is therefore not a final and appealable order.

For the reasons stated the appeal will be dismissed.

APPEAL DISMISSED.

WILSON, P.J. AND HEBEL, J. CONCUR.

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BONALD S. HowIllIAM, et al,

V.

THEODORE W. MAY, et al,
Plaintiffs in Error.

THE CIRCUIT COURT

261 I.A. 6513

Opinion filed May 13, 1931

MR. JUSTICE HEBEL delivered the opinion of the court.

This is a writ of error prosecuted by the defendants
(plaintiffs in error), Theodore %. May and Bell R. May, to review the
decree of the Circuit Court of Cook County entered in the foreclosure
proceeding instituted by Donald S. McWilliams and Hugh L. McWilliams,
Trustees, complainants (defendants in error) against Theodore W. May
and certain other defendants.

It appears from the record that on March 3, 1928, the said defendants, Theodore W. May and Bell R. May, owned the property known as 4620-22 Brexel Boulevard, Chicago, Illinois; that the premises were improved with a 17 room 3-story brick and stone residence, and a substantial 3-story stable-garage-apartment on the rear of the land, which improvements originally cost \$45,000; that the house had been remodeled into a 3-apartment building, the first floor renting for \$150. per month; the second floor for \$125. per month, and the third floor for \$115. per month; that the 3-car garage and the apartment both, rented for \$67.50 per month; that Theodore W. May, one of the defendants, valued the land at \$800 a front foot, or a total of \$48,000, and the improvements at \$15,000.

On the date heretofore referred to, the said defendants, a Theodore W. May and Hell R. May, executed \$20,000, 6 per cent first mortgage on the premises, due on March 2, 1931; and thereafter on May 1, 1938, they executed a \$10,000, 6 per cent second mortgage on the same premises.

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Opinion filed May 13, 1931

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on the data heretofore referred to, the said defendants, the court of the court of the court of the premises, due on Murch 2, 1931; and thereafter on May 1, 1928, they executed a \$10,000; 6 per cent second mortgage on

The note secured by the second mortgage was owned by the complainant Donald S. McWilliams, which mortgage was foreclosed in these proceedings.

On October 1, 1928, the said Theodore W. May and Bell R. May, defendants, conveyed said premises to the Forty Six Twenty Drexel Boulevard Building Sorporation, an Illinois Sorporation, of which J. S. Nadel was president, organized to erect on said premises a large 7-story apartment building. This conveyance is still in the escrow department of the Chicago Title & Trust Company; only 15,000 of the agreed consideration of \$41,000 was paid by the corporation to the Mays.

On the same date, viz., October 1, 1838, the forty-six Teanty Drexel Boulevard Building corporation executed a trust deed to secure an issue of 613 bonds, aggregating \$270,000, which was recorded. The bonds, however, were never signed, negotiated or delivered.

Both the Sentral Manufacturing District Sank and Bertram M. Finaton, representing the owner of the 180,000 first mortgage, and the complainant, Bonald D. McWilliams, owner of the \$10,000 second mortgage, refused to consent to the wrecking of the then existing improvements on the premises, which improvements added \$15,000 to their security.

In the middle of November, 1988, without the knowledge of said mortgage holders, said J. S. Nedel put a crew of wreckers on said buildings and completely demolished them; and also without their knowledge, proceeded to erect a new 7-story apartment building. The foundation work was completed; forms had been built, and concrete poured, and the walls had advanced to about half a story above the ground, when the work came to a stop. Many of the forms were still standing, and quantities of materials were on the ground. Some of the sewer work had been done, and a new sewer had been laid from

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the proposed outlets of the building to the street; certain connections had been made with the City mater pipes, and a lot of rough carpentry work had been done.

Failure to negotiate the \$270,000 loan, and failure on the part of J. S. Nadel to pay off the \$20,000 first mortgage and the \$10,000 second mortgage, change of plans in order to comply with a 36-foot front building line, and the inability to obtain a building permit from the suilding Department of the City of Chicago, on the plans tendered, prevented the continuance of the work.

Thereafter, mechanics' lien claims, aggregating approximately \$12,000, were filed against the premises, all claiming priority over said encumbrances; and two suits were pending to foreclose mechanics' lien claims, in one of which the owner of the \$20,000 first mortgage appeared by counsel.

The solicitor for the complainant, Bonald S. McWilliams, who testified before the Master as to the legal services rendered and to be rendered by him and his firm, took into consideration the surrounding facts, and basing his opinion on 350 hours spent and the results accomplished, stated the fair, reasonable, usual and customary charge for solicitors in this jurisdiction for like services to be \$3500. This testimony was in the presence of Theodore W. May, one of the defendants, and his solicitor; both of whom the record shows were present. In response to the Master's question, "Any cross-examination?" Mays' solicitor replied, "No cross-examination."

The Master upon filing his report on April 18, 1930, among other things found \$3500 to be a reasonable fee to be allowed to the complainant, Donald S. McWilliams, for the services of his solicitor, to which Master's report these defendants filed no objection nor filed exceptions to the report when presented to the trial court for approval:

The decree of sale entered on March 11, 1930, fixed the debt due and owing to the complainant, Donald S. McWilliams,

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at \$15,596.36, which included \$3500 for solicitor's fees, and a second lien on the premises, subject only to the \$20,000 first mortgage, and subrogated all to the mechanics' lien claims, aggregating about \$12,000, to the first and second mortgages. The Master's report had found the amount due the complainant, Donald S. McWilliams, to be \$14,996.36, but before the decree was entered, said complainant, on March 3, 1930, was compelled to advance an additional \$600 to pay interest on the \$20,000 first mortgage. This was, therefore, included in the decree.

Thereafter, a sale of the real estate was had under the terms of the decree. The Master filed a report of sale and distribution, from which it appears that the complainant, bonald S.

McWilliams, was entitled to a deficiency degree against the defendants, Theodore W. May and Bell R. May, for the sum of \$3,728, being the difference between the sale price of \$12,000 offered and paid by the complainant, Donald S. McWilliams, and the amount then due; and, on the same day, an order confirming the Master's report of sale and distribution and a deficiency decree, was entered by the court, without objection of record,

The only objection made on this appeal by the defendants, May, is that the solicitor's fees of \$3500 allowed to the complainant Donald S. McWilliams, are grossly excessive. This may appear to be so, but there is uncontradicted evidence that 350 hours of service were rendered by the complainants' solicitor and that \$3500 was a fair and reasonable fee for the work required to be performed in this case.

Parties aggreived will not be permitted to stand by upon a trial and allow a Master's report and a sale under a decree to be approved by the court without objection, and then expect a reviewing court to consider the objections which should have been called to the attention of the trial judge. It is too late for these defendants to object to this allowance at this time.

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Thereafter, a male of the real estate mee had under the some of the decree. The marter filed a report of sale and distribution.

May illians, were entitled to a deficiency degree against the defendants. Theodore T. day and bell R. May, for the aum of 13,725, being the difference between the sale price of 114,000 effered and paid by the complainant, howeld S. Mevillians, and the assemt that due; and on the same day, an order account the separt of acle and the same day, an order account the separt of acle and the same day, an order account,

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Smyth et al v. Stoddard, 303 Ill. 424; Kronkrite et al v. McGrath, 82 Ill. App. 340; Obermann Brewing Go. Ohlerking, 53 Ill. App. 36; Sampson, et al v. Reely, Trustee, et al, 106 Ill. App. 129; Marsh v. Mick, 159 Ill. App. 399 Chicago Title & Trust Co., Trustee, et al, v. Franklin, 187 Ill. App. 388.

The complainant Donald S. McWilliams has called our attention to the fact that the decree, which was a draft of the Master's recommendations, was O.K.'d and signed by the defendants' solicitor before the decree was signed and entered in this cause; and therefore by such act it became a consent decree. Such is the rule, and a case in point is Bergman v. Rhodes, 354 Ill. 137, wherein the court said:

"A consent decree is not a judicial determination of the rights of the parties. It does not purport to represent the judgment of the court but merely records the agreement of the parties. A decree so entered by consent can not be reviewed by appeal or writ of error. (Faine v. Doughty, 251 Ill. 336; Galpay v. Galway, 231 id. 217). It can only be set aside by an original bill in the nature of a bill of review. (Mohenadel v. Steele, 337 Ill. 229.) In Mungarian Benevolent Society v. Aid Society, 283 Ill. 99, it was held that where neither party objected to a master's report, a decree in accordance with the master's finding, which was approved before entry by the Ol K. and signature of councel for both sides, became a consent decree, that where an attorney is the counsel of record for a client, his agreement in the conduct and management of the litigation must be considered as the agreement of his client, and if any of his acts are without sufficient authority as between him and his client the remedy of the client is against the counsel."

The motion made by the complainants, Donald S. McWilliams and Hugh L. NcWilliams, to quash the writ of error, will not be entertained, for the reason that the questions called to our attention by that motion are disposed of by this court in this opinion.

The decree, the order confirming the Master's report of sale and distribution, and the deficiency decree, are, accordingly, affirmed.

AFFIRMED.

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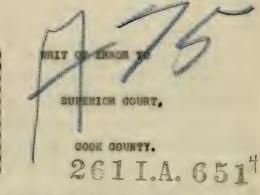
JOSEPH SZAREK, a minor, by ANNA SZAREK, his mother and next friend,

Plaintiff in Error.

V.

JOSEPHINE SUM SZAREK,

Defendant in Error.



Opinion filed May 13, 1931

this case is before us on a writ of error prosecuted by the complainant (plaintiff in error), by Anna Szarek, his mother and next friend, to review the record of the trial court in diamissing the complainant's bill for want of equity.

the ground that the complainant, a minor seventeen years of age and under the statutory minimum age of consent, which is eighteen, was without legal capacity to enter into a marriage ceremony; that the complainant entered into the marriage ceremony under durese brought about by the defendant's mother, with the knowledge and consent of the defendant, and by reason of a marriage license being procured by fraud; and that said marriage was not consummated or ratified by the complainant when he reached the statutory minimum age of consent.

The defendant, being also a minor, through her guardian, ad litem, answered the bill, not admitting or denying, but demanding strict proof.

Upon the trial, evidence defeloped that the defendant had a child born to her one week before the marriage ceremony was performed, but the complainant denied that he was the father of said child, and the court, after a hearing, dismissed the bill for want of equity.

From an examination of the record, we are of the

JOSEN S MARK, a minor, by anna Standa, his mother and next friend,

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Opinion filed May 13, 1931

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How the trial, evidence devaloped that the defendant had a child born to her one week before the marriage ceremony rosperformed, but the complainant demied that he was the father of said child, and the court, after a bearing, dismissed the bill for cont of equity.

opinion that this case must be reversed, and that it will not be necessary for the court to comment on the evidence, except to point out the facts that warrant a reversal and a new trial.

of complainant's mother, who was not present, to an application for a marriage license, and was sworn to the facts set up in the application, the necessity for such act being the fact that the complainant was only seventeen years of age, and consent of the parents was necessary in order that the County Clerk issue a marriage license to the parties. Such act by the mother was a violation of the statutory provision under Chap. 89, Sec. 3, Cabill's Ill. Nev. Stats., and such violation was admitted in open court. This witness when testifying indicated that an eath to tell the truth meant very little, and her conduct on the stand called for a reprimend by the court.

The complainent testified that the mother of the defendant appeared before the County Slerk, in the presence of the complainant and the defendant, and falsely represented herself to be Anna Szarek, the complainant's mother, and signed the name of the complainant's mother to the application for the marriage license; that at that time the defendant's mother showed the complainant a black bag with a revolver in it, and told him that if he did not sign the papers handed to him at the Clerk's window and answer the Glerk's questions as she wanted him to, she would kill him and his mother, or have the "Three tough looking fellows", who were standing there, kill them.

The complainant further testified that thereafter the complainant, while on his way to supper, was taken by force, in an old car by the three men that he saw at the marriage license window to the defendant's home, and the defendant's mother again threatened him; that he was then taken by force in the same car by the same men to within a block of St. Bonifact Church, and was told to stand on the didewalk, and, after the defendant and her sister arrived, one of the

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The unther of the defendunt, Mery Sur, plyned the neme of complainant's mother, who was not present, to an equilochica for a marriage license, and see sworm to the facts set up in the applierman and the set up in the applierman only seventees years of age, and sensent of the parents was not in the control of the control

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The compinions further testified that the contest the three license which to the defendant's mother again threetened him; that he was then taken by force in the same can by the same men to mithin a block of st. desifiet thursh, and was teld to stead on the diderall, and, after the defendant and her stater errived, one of the

three men got out of the car and came up to him and said, "If you don't go through with this marriage, we will get you when you come out; and showed him a revolver; that the marriage took place at 7:30 in the evening, and that after leaving the church he was further to threatened by the defendant's mother not/tell his mother, or any one of his family, or he would be killed. This evidence of the complainant is not denied or contradicted by any evidence offered by the defendant.

From this evidence, the complainant was not a free agent, but was impelled by the threats of the defendant's mother and made to enter into a contract of marriage. Some of the threats were made in the presence of the defendant in this case, and it would seem, where such facts were testified to by the complainant, that evidence bearing upon the charge should have been presented on behalf of the defendant.

The decree entered in this case is manifestly against the weight of the evidence, and the court was in error in dismissing complainant's bill for want of equity.

There is evidence in the record offered by the defendent which is subject to criticism, but in view of the fact that a further trial is necessary, this court will make no further comment, except to say that the failure of the defendant to enter her appearance and file a brief does not assist this court in determining the questions before us.

for the reasons indicated, the decree of the court dismissing the complainant's bill for want of equity is reversed and the cause remanded for a new trial.

REVERSED AND CAUSE REMANDED.

WILSON, P.J. AND FRIEND, J. CONGUR.

three men got out of the car and came up to him and said, "If you and shows him a revolver; that the amitisgs took place at 7:33 in the evening, and that that the obuton he was further to the country, or he would be killed. This evidence of the complain-

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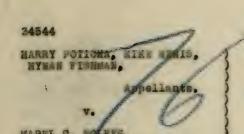
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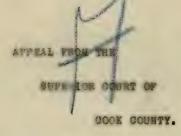
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REVERSED AND CAL CHOPSVER.

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Appellee.



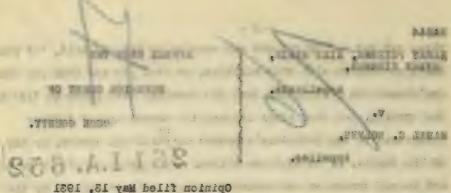
261 I.A. 652

Opinion filed May 13, 1931

fhis is an appeal by the complainants from a decree dismissing complainants' bill for want of equity. The bill is for the reformation of a renewal clause in a lease and for specific performance of the lease as reformed. After a hearing, the court dismissed the bill for want of equity with specific findings to the effect that:

The complainants executed the lease with a full and complete knowledge of its terms; there was no fraud in the execution of the lease; there is no evidence of the true rental value of the premises; the renewal clause is vague and indefinite as to future rental; there is no fraud, accident or mistake as a besis for reformation, and that the complainants have an adequate remedy at law.

In may, 1925, complainants leased a store from the defendant, known as 4739 South Ashland Avenue, Chicago, Illinois, for a five-year period, with a chause giving an option for a renewal for five additional years at such rental as, "the Lessor, her heirs or assigns shall determine to charge". A tendered renewal lease by the defendant, fixing the rental at 2,000 per month, was rejected on the ground that the rent was unreasonably high. The complainants' theory is that they were induced to sign the five-year lease by the defendant's contemporaneous oral promise to be reasonable in fixing the rental for the rental period; that the defendant arbitrarily fixed the rental unreasonably high, which constitutes a fraud; that the court should reform the lease by striking out the language, "as



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This is an appeal by the complainants from a decreasion in the complaint from a decreasion in the complaint from a decreasion of the compact there are no fraud in the execution of the leave; there are no fraud in the execution of the leave is no laws of the complaint there is no laws of the complaint the complaint

In May, 1885, complaines at lease in store from the diverges period, with a clause giving an option for a renewal for five additional years at each reptal as, "the losser, her heirs or him as shall determine to charge". A tendered renewal loace by the ground that the rent see arronagently high. The complainment "theory is that the rent see arronagently high. The complainment theory to sign the five-year lease by the the rental veried; that the defendant architectly the court for the rental veried; that the defendant architectly the court the language, "...

said lessor, her heirs or assigns shall determine to charge," and insert in lieu thereof, apt words expressing a reasonable sum as the rental for the renewal period, and decree specific performance on that basis.

On the other hand, the defendant contends that the transaction is free of fraud; that the lease is the one the parties intended to execute, and therefore not subject to reformation; that the lease has been fully performed, and that the renewal clause is void for uncertainty.

This controversy hinges on the construction of a provision in the lease between the parties to this litigation, which provision is in these words:

"A renewal lease for the further term of five years, at such rental as the leasor shall determine to charge for said demised premises, whether the same be a greater amount or at the rate of the present monthly rental."

It appears from the facts in evidence that at the time the lease was executed by the parties, the question of an extension at the expiration of the term of the lease was the subject of negotiation. The complainants were desirous of a five year extension, at a rental of \$325 per month, but the defendant would only consent to the extension upon the terms incorporated in the lease, which was finally agreed to by all parties.

The complements contend that the act of the defendant in tendering a lease at a rental of 48,000, was fraud and not in accord with the intention of the parties.

There was no fraud charged in respect to the execution of the lease. The facts indicate that the subject of renewal was discussed with the parties before the execution of the lease, and as a result of the discussion the provision incorporated and written in the lease was the agreement of the parties, and that by that act all contemporaneous oral promises or agreements were merged in the written document.

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and the lease was the agreement of the parties, and that by that act

all contemporarous oral cromises or agreements were marged in the

The parties to this litigation were persons of business experience and must have understood the meaning of the words used, "at such rental as the lessor shall determine to charge for said premises." The language is not ambiguous; its meaning is clear. The lessor reserved the right to fix the future rental for the extension period. The fact that the rent was fixed at \$2,000 per month by the defendant was a right which she had reserved in the centract, and this court will not interfere or exercise its judgment in determining whether or not the amount was a reasonable one. There is evidence, however, that a tenant rented the entire building at a monthly rental of \$1,000. The complainants may have believed that the defendant would fix a more reasonable rental for the extension period, and if in their opinion the rental was not reasonable, they would be under no abligation to continue in possession.

The contract was entered into by the parties, and the court will not, under the facts in evidence, modify or amend the contract of the parties, nor interfere, except to enforce its provisions. The rule is that a court of equity will not reform an instrument when it was prepared in the presence of the parties, read over by them, and signed without mistake as to its wording. None of the subject matter agreed upon between the parties was left out by the writer; nor was any that had not been agreed upon inserted. Noisey v. Neeley, 46 Ill. App. 367.

The instant case comes within this rule, and the complainants are not, under the facts, entitled to the relief prayed for. The defendant offered to perform, after the three months' notice was given by the complainants and tendered a lease, at a monthly rental of \$2,000, which was not accepted by the complainants, and for the reasons indicated in this opinion, the decree entered by the trial court dismissing the complainants' bill for want of equity, is affirmed. experience and must have understood the meaning of the mords used, "at ouch rental we the lesson shall determine to charge for said presides." The language is not employed; its meaning is clear. The language is not employed at (2,000 per meaning by the period. The fact that the rest was fixed at (2,000 per meanin by the fact of the fact that the confidence is in the confidence that the desired at the confidence that the desired is the fact of the

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THE GUARANTUE CONPANY OF NORTH

Appellee,

V.

WM. V. HOIER.

Appellant.

COOK COUNTY.

261 I.A. 652

Opinion filed May 13, 1931

MR. JUSTICE HEREL delivered the opinion of the court.

The plaintiff, The Quarantee Company of North America,
a corporation, brought suit in assumptit against an. V. Hoier,
defendant, to recover upon an alleged indemnity agreement between the
defendant and the plaintiff. A trial was had before a jury, and
at the close of the case a verdict was returned assessing the
damages against the defendant, Nm. V. Hoier, in the sum of \$12,583.72.
After motions for a new trial and in arrest of judgment were overruled,
judgment was entered on the verdict. To reverse said judgment this
appeal is prosecuted by the defendant.

The plaintiff filed in said onuse a second asended declaration, which was further asended and consisted of two counts, to which defendant filed a plea of the general issue, with notice of special defenses under said plea, together with his affidavit of merite.

September 34, 1925, the Inland Ingineering Company, of Hammond,
Indiana (hereinafter referred to as the contractor), made application
to the Guarantee Company of North America, the plaintiff in this cause,
for a certain surety band running to the Elka Realty Company, of Mact
Chicago, Indiana, in the penal sum of \$58,865, in connection with a
contract alleged to have been entered into on said date between said
contractor and the said Elka Realty Company (hereinafter referred to
as the owner), for the furnishing of all labor and materials, and

Opinion filed May 13, 1931

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 for the heating, ventilating and plumbing work to be installed in a certain 3-story and basezent building to be erected for said owner.

As a result of said application for the bond, the plaintiff corporation did execute said surety bond to said owner, on the 34th day of Teptember, 1985. An indeanity agreement attached to the application for the surety bond was executed by the defendant, wa. V. Noier. Subsequent to the execution of the surety bond, on September 30, 1985, the owner and the contractor entered into a building contract, setting forth the work to be performed, the terms and conditions of employment, and all matters relating to the contractor's duties.

Thereafter, the contractor proceeded with the work under its contract, and from time to time submitted estimates of work completed and its value in dollars and cents to the architect, who examined the estimates and the work to determine their correctness, and issued his certificates authorizing payment to the contractor. This continued through the month of September, 1926, when the contractor submitted for approval his eleventh estimate introduced in evidence, showing in figures that the entire contract with extras had been completed and a balance due the contractor of \$14,554.32. The evidence shows that the architect examined the same, inspected the work, and thereupon, on or about the 10th of October following, issued his architect's certificate in the sum of \$8,000, which was paid to the contractor.

Following this payment it appears that the owner of the property made complaint to the plaintiff corporation that the contractor was not complying with his contract, and there is evidence that notice was given to the defendant of such alleged default and calling upon him to save the plaintiff harmbees from and by reason of having executed its surety bond, which, however, is denied by the defendant.

It appears from the evidence that after the payment to the contractor of the sum of #8,000, there remained due said contractor

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Thereafter, the contractor proceeded with the rock under ploted and its value in deliver and conts to the architect, who assumed the satimates one the sacinates and debruics that correctness, and issued his satimates antherising payment to the contractor. This submitted for approval his eleventh satimate intereduced in evidence, so the same for the continue to the continue to the same of the local security in the sum of 13,000, shick was paid to the architect's continue to the sum of 13,000, shick was paid to the

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the sectional of the case of \$2,000, there remained due note to telegrapher

the sum of \$7.854.70, which was in the hands of the owner, and it also appears that the owner made numerous payments between Movember. 1936 and September, 1937, totalling \$7,505.34, leaving a balance in the owner's hands of #348.46, which it turned over to the plaintiff company; and that the plaintiff company in July and August of 1027. paid out a total sum of \$12,288.48 direct to sub-contractors. appears that these payments were made by checks issued by the plaintiff company to the individuals therein named.

There appears to be no question as to the date of the execution of the application for the surety bond, the execution of the surety bond and the execution of the building contract. The record discloses some conflict in the evidence as to whether the contract of indemnity of the defendant was executed on the date it bears, or whether it was executed some time later.

It was on the question of the date of the indemnity agreement that the defendant called as his witness Frank J. apalka. and the defendant contends that while the witness was on the stand testifying the trial court made remarks in the presence of the jury which tended to discredit the witness, and which were prejudicial to the defendant, who offered this witness. In support of this contention the defendant quotes from the record the following:

"The Court: I would like to ask a cuestion.

A. Yes.

A. well, you are supposed to see a document signed. Q. And you did not see it? A. I did not.

And you knew you were perpetrating a confidence game,

didn't you. A. I wouldn't say that. Mr. Reinecker: I object to those remarks.

The Court: Don't you know that is what it was if your testimony is true here? You are testifying to a signature that you did not see and you did not know.

A. Yes, your Honor.

Do you want the Court and jury to understand you testified to this signature as a witness and there wasn't any signature there? A. The signature was there when I signed it.

But you witnessed the signing, didn't you? A. I did not. well, what do you understand a witness to be to a document? Q.

And you knew he did not sign when you signed? A. I knew it.

Q. For what purpose? A. Just to complete an application.

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Q. To submit to some other company, wasn't it? A. Yes, sir.
Q. Yes, as an indemnity bond? A. Yes, sir.
Q. Well, what was the effect of it? Was it not to fool the other company, whatever company they took it to?

Mr. Reinecker: Now, if your Monor please, the bond had already been written and the evidence shows -

Mr. Kealy: The evidence does not show any such thing.

Mr. Reinecker: I am going to object to all of these cuestions asked by the Court and I am going to ask the jury to disregard them, because I don't think it proper, especially coming from the Court in that light.

The Court: Here is this man in business in Chicago twentyfour years, coming and testifying to an absolute falsehood that is obvious in itself.

Mr. Reinecker: I object to that and sak that the jury be ordered to disregard it, because it is highly improper. This man comes in here, simply testifying he signed as a witness, a document for the purpose of completing it and sending it to a surety company, after william V. Hoier signed it.

and, again, the defendant called our attention to the remarks of the court during the examination of the witness Earl D. Morris, called on behalf of the plaintiff, as follows:

"Mr. Cooke: The question of your Konor was as to who employed the Swin City Flumbing Company. I assume he supervised it. but they were employed to do it.

Mr. Realy: The Twin City Flumbing Company did the work for the like Realty or the Inland Engineering Company.

Mr. Cooke: I object to that. That is a conclusion and that is an ultimate fact for this jury to say.

The Court: If you know, who employed the Twin City Plumbing Company to do the work, tell us."

Complaint is also made by the defendant that during the examination of the same witness, the following occurred:

"Exception.

Hr. Cooke: And for the further resson, if the Court please, there has not been shown here there were any unpaid billy. nothing in this record now tending to show it.

The Court: They are trying to show it as hard as they can.

Mr. Cooke: Well, now, I object to the state ent of the Court. This is a matter for the jury, and that indicates the

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 - Mr. Gooker soil, now, I object to the whitement of the Court, This is a matter for the jury, and that indicates the

Court's view upon an ultimate fact here.

The Court: You are bound to get error in this record. I will give you all the chance you went. Your objection is overruled. Proceed.

Mr. Cooke: I object to the latest statement of the Court.

The Court: All right, keep on objecting.

Exception."

It is urged that from the remarks called to the Court's attention the defendant did not have a fair trial, and that they were prejudicial to the defendant who produced the witness, Opelka as was also the criticism of the conduct of his attorney, so that the verdict returned was not a fair verdict.

The plaintiff's reply to this contention is that there was no excuse whatever for any of the testimony offered by the witness Opelka; that the colloquy complained of between the court and the witness Opelka was not prejudicial to the defendant, and further that the tactics of defendant's counsel upon the trial of constant and repeated objections were obviously intended for the purpose of vexing the trial court and confusing the jury.

Soth parties to this litigation rely upon the decision of the Supreme Court in the case of <u>Dunn</u> v. <u>The People</u>, 173 Ill. 563, in which the court says:

"In <u>Dunn</u> v. <u>Feople</u>, 172 Ill. 582, the court, in considering somewhat similar action by the trial judge, made use of the following language:
Though at times the court may, by an opportune and carefully considered question, elucidate a point, aid an embarrassed witness or facilitate the progress of a trial, without in any degree influencing the jury or arousing distrust in the minds of the parties or their attorneys, yet the examination of witnesses is the more appropriate function of counsel, and it is believed the instances are rare and the conditions exceptional in a high degree, which will justify the preciding judge in entering upon and conducting an extended examination of a witness, and that the exercise of a sound discretion will seldom deem such action necessary or advisable."

This ruling of the Supreme Court is pertinent in this case. While a trial judge should, and it is his duty, by careful

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questions put to a witness to clear up facts that appear to be confused and which would facilitate the progress of a trial, still it is not his duty to criticise the testimony of a witness by the use of such words as "a confidence game", and "absolute falsehood", which appears to have been done in the instant case and no doubt influenced and created a distrust in the minds of the jury, which affected their judgment in passing upon the rights of the defendant. The attitude of the judge should be such that the jury will not be influenced by anything said by him in their presence during the trial. Sometimes a trial judge is sorely tried, and he may be vexed by the conduct of counsel, or a witness, still he should only in the absence of the jury reprimand counsel, as well as the witness, if occasion requires. Generally, examination of witnesses is for counsel in the case, and a trial judge is never justified in conducting an extended examination of a witness. The trial judge is to pass upon objections made by the attorney offering such objections, but occasion should not arise during the trial for the court to remark in the presence of the jury. by way of criticism, that the attorney is, "bound to get error in this record, and that he is going to get a chance.

The court may, during the absence of the jury, admonish an attorney where it is plain that the objections are trivial and are made only to delay and interfere with the administration of justice, and, in a proper case, the court may punish, if an attorney so conducts himself as to interfere with a proper and orderly disposition of the trial.

Other questions have been called to the Court's attention, but in view of the conclusions we have reached, it will not be necessary to pass upon them at this time.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

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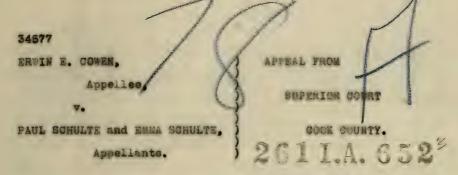
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REVENUE AND ROUBLIED.



Opinion filed May 13, 1931

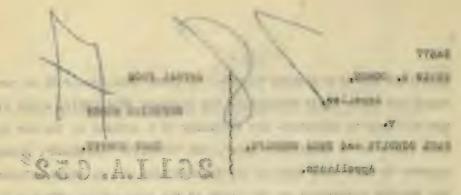
This is an appeal by the defendants from a judgment for the plaintiff and against the defendants in the sum of 43,927.94, entered by the court upon the verdict of the jury after overruling motions for a new trial and in arrest of judgment.

The declaration avers that on the 7th day of March, 1984, the plaintiff was desirous of purchasing a certain piece of real estate, known as The Mesley Apartments, located and situated in Oak Park, Illinois; that the defendants were or pretended to be the owners of said property, and that they entered into a contract on said date with the plaintiff, in which they agreed to convey said property to the plaintiff within a reasonable time specified in the contract, and which said contract was signed by the defendants.

The declaration further evers that although the time has long gone by since the execution of the contract, the defendants have refused and still do refuse to convey the property to the plaintiff, and that at the time of the signing of the contract, the plaintiff deposited with the defendants the sum of \$3,000, to be held as earnest money by the defendants.

It is further averred that notwithstanding these facts, the defendants have refused to convey the said property and have retained said earnest money,

The defendants filed a desurrer to the declaration,



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which was overruled by the court, and thereafter filed a pies of the general issue to said declaration.

An order was entered that the plaintiff file a copy of the instrument sued on, which was done.

The defendants contend that R. R. Fowler, Judge of the City Court of Marion, Illinois, was not authorized by law and was without jurisdiction to preside as a judge in the Superior Sourt in the trial of the case now before this court, for the reason that he was not properly authorized in the manner provided for by statute. It appears that an order was entered by the Executive Committee of the Superior Court of Cook County as follows:

"It is ordered by the executive Committee that R. R. Fowler be and he is hereby assigned to take up the call of Judge Walter F. Steffen Common law Calendar No. 18, in Room 939, Court House, commencing Monday, Way 18, A. D. 1930, and until further order of said Committee."

The defendents admit that Juiges of the several Gircuit Courts of the state may interchange with each other and perform each other's duties, which applies to the City, County and Probate Courts, but not to the Superior Court of Cook Sounty. However, this question is not a new one, and this court in the case of seely v. Pribyl's Estate, 195 Ill. App. 314, in considering a question similar to the one we have before us, reached a conclusion contrary to defendents contention in these words:

"Section 245 of Chapter 37, Rev. St. (J. & A. Par. 5294), clearly seems to authorize judges of city courts to hold court for Circuit Court judges in book county. The section reads as follows:

'Such judges may, with like privileges as the judges of circuit and county courts, interchange with each other, and with the judges of circuit, superior, county and probate courts, and may hold court for each other, and for judges of circuit, superior, county and probate courts, and perform each other's duties, and the duties of judges of circuit, superior, county and probate courts, when they find it necessary or convenient."

In American Car & Foundry Co. v. Hill, 336 Ill. 237, it was held that under this statute a judge of a city court was qualified to preside at the trial of a cause in the direuit Court. See also, opinion in thite v. Merhold, 182 Ill. App. 477, in which this identical question was involved.

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An order was entered that the picintiff file a copy of the instrument such en, which was done.

The defendants content that N. h. Fooler, dudge of the Sity Court of Marios, Illinois, was not authorized by law and was the true lated of the case now before this sourt, for the resease that be not true to the case of the spacers that are cased by the Eresutive Committee of the spacers that an order was entered by the Eresutive Committee of the state that an order was entered by the Eresutive Committee of

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that passed upon by this court in <u>lessly</u> v. <u>Iribyl</u>, <u>supra</u>, and the court cites as authority for its conclusion the Supress Court in the case of <u>Reitz</u> v. <u>People</u>, 77 III. 518. He question, however, is raised by the defendants in this case as to the form.

From the record, we are inclined to follow the opinion of this court in the Fribyl case, and hold that the judge presiding at the trial of the case now before us on appeal, was properly authorized by the statute and presided at the request of the judges of the Superior Court of Cook County.

of action. It appears from the record that the defendants filed a desurrer to the declaration, which was overruled, and thereafter filed a plea of the general issue. The general rule is that pleading over to the merits after the overruling of a decurrer will waive a defective statement of a good cause of action, and admit the sufficiency of the declaration. Folf v. Forers, 3dl Ill. 3. A further rule is that before judgment, the declaration is to be atrictly construed against the pleader, and that efter judgment the pleading upon which it is based is to be liberally construed to sustain the judgment.

Smith v. Butledge, 332 Ill. 180; Boumbos v. City of Chicago, 232 Ill. 70.

For the purposes of this case the declaration is sufficient to sustain the verdict. An action in assumpsit will lie to recover soney obtained by the defendant from the plaintiff, which in equity and good conscience the defendant has no right to retain, and in such case the law implies a promise to pay. Greenwood v.

Thompson Co., 21% Ill. App. 271, Stewart v. Brady, 30% Ill. 445. And this is implied by law in the event of default on the part of the defendant, although the defendant did not make an express promise.

The next point urged by the defendants is that the plaintiff erred in not filing a bill on the equity side of the court

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of the decimation. Yolf v. invers. Mil lil. 3. A further rule in that hefore judgment, the decimation is to be strictly construct and the pleading uses which is based is to be liberally construed to suntain the judgment.

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for recission of the contract, on the ground of misrepresentation.

Plaintiff answers this contention by stating that the plaintiff's suit is brought upon a contract which is in full force and effect, and which was breached by the defendants, and that the plaintiff is merely seeking the teturn of his money because of the failure of the defendants to fulfill the terms of this agreement. The record sustains this contention.

The contract is dated March 7, 1984. Suit was filed by the plaintiff on January 10, 1927, and a trial was had on May 12, 1930. The record is silent as to any offer made by the defendants to perform at any time. It may be that the plaintiff had a choice of remedies, but he elected to sue in assumpsit, and for the reasons indicated by the court, this was a proper action under the facts in evidence.

The defendants complain that the court erred in permitting the plaintiff, over objection, to introduce evidence of conversations that were had prior to the making of the contract. The contract involved in this litigation required the defendants to furnish the plaintiff a guarantee policy or a certificate of Title from the registrar of titles within a reasonable time, and what is a reasonable time is to be determined from the surrounding circumstances and the expression of the contract itself. Upon the margin of the contract the following is written:

"This contract to be consummated within 30 days after lawsuit now pending before Humphrey (Master) is disposed. In case vendor shall be unable to deliver premises on account of said lawsuit then in the toase said vendor shall not be liable for commission."

This memorandum is not signed by the parties, and is not embraced in the body of the contract. The rule is that all conversations prior to or at the time of the execution of a written contract are merged in the agreement, and that parol evidence be not

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The contract is deted March 7, 1924. Suit was filed by the plaintiff on Jenney 13, 1827, and a trial was had on May 12, 1827. The result of the result of the result is the result in the cleated to one is accumpate, and for the result is inclean.

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not embraced in the budy of the contract. The rule is that all conversations of a written contract are accusion of a written contract are accepted in the agreement, and that parallevidence be not

permissible to alter or vary the terms of the contract, except in case of ambiguity, where a resort to parol evidence is necessary, not for the purpose of altering or changing the contract but in order to ascertain the true meaning of the parties. This rule applies to all actions, whether in law or equity. It is also a rule that words of doubtful construction are to be construed strictly against the party using them. In this case, the defendant raul schulte testified, in part, as follows:

"Then they dree up the contract. Ar hagle then dree up the contract and I made them put that on the contract. I don't want any trouble because I could not deliver the title until the case was out of Court."

which evidence would seem to indicate that the language on the margin of the contract is the language of the defendants. The marginal note does not disclose the nature of the lawsuit that was pending before the Master in Chancery. Evidence that the defendants stated at the time that the action before the Master was a mechanic's lien suit, was competent, and so was the evidence of the witness Magle that he wrote the marginal note at the request of Faul Schulte, one of the defendants. However, the evidence of magle that it was stated to him by wr. Schulte that if he were not successful in the lawsuit he did not than to pay the brokers a commission, is not reversible error, for it does not vary, change or contradict the terms of the writing.

during the examination of the witness Faul Schulte, one of the defendents, required him to answer the question, "are you willing to give back the money?" which was objected to, and the court, in the presence of the jury, remarked as follows: "The client has a right to do as he pleases, the lawyer don't amount to anything, it is all what the client wants to do. If he mants to give that back he has a right to do it regardless of the fact that you represent him.

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prejudicial. The same witness, however, testified, in answer to a question, that "He (meaning the plaintiff) never asked me for his money back. He never asked me to deliver some evidence of the title. The title is in the Torrens office." He further testified that the plaintiff blackmailed the defendant. The court permitted the defendant, Paul Schulte, to give an explanation of what was meant by "blackmail," which was not objected to by the plaintiff, and thereby afforded the witness an opportunity to explain his refusal to carry out the terms of the contract or to return the money. The Sourt's statement did not create prejudice in the minds of the jury, but on the contrary indicated in the presence of the jury the fairness of the Court in permitting the defendant Schulte to testify to the use of the word "blackmail", and the remarks of the Sourt, in view of the record, were not prejudicial to the defendants.

Interest was allowed by the jury in computation of the amount due the plaintiff. The only complaint made is that the Court, in its instruction, fixed the date of the deposit of the money from which to compute interest if the jury found the issues for the plaintiff which was reversible error, for the reason that interest may be allowed only as provided for by Section 2 of Chapter 74 of Smith-Hurd's Statutes of Illinois.

The rule is that interest may be allowed where property or money is prongfully withheld after demand. In this case the plaintiff is entitled to interest for the reason that the record discloses that he made a demand for his money. Parties are specially liable where money is withheld by an unreasonable and vexatious delay of payment, which according to the record appears to have been done in this case. The trial court, in view of the record, was amply justified

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question, that 'Mc (meaning two picintiff) merer soied to you his woney back, he never soied as to deliver some evidence of the title. The sitle is in the forzone office." He further testified that the the the sait. Fact is in the force of special test of the vitues of the expensive to excising the refusel to carry situated the vitues an opportunity to explain his refusel to carry vitues of the vitues of the jury the fairness of the presence of the jury the fairness of the ourse.

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in refusing a new trial, and in entering a judgment for the amount of the verdict, and we believe that substantial justice has been done, and that there is no reversible error in the record that rould warrant a reversal.

JUDGMENT AFFIRWED.

WILSON, PJ. AND FRIRND, J. CONGUR.

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ARRODE, 23. AND PRINCIPLE 3. COURT.

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PROPLE OF THE STATE OF ILLINOIS, ex rel, OSCAR MELSON, as Auditor of Public Accounts of the State of Illinois,

(Complainant below),

GHICAGO TRUST GGMPANY, Receiver of ROOSEVELT-BANKERS STATE BANK.

(Petitioner below),

Appellee,

V.

SUPREME LIBERTY LIFE INSURANCE COMPANY, a Corporation, and DAVID MANSON,

(Respondents below).

Appellants.

APPEAL PROP

INTERLOCUTORY ORDER

ENTERED IN THE

SUPERIOR COURT

OF COOR COUNTY.

61 I.A. 6524

Opinion filed May 13, 1931

This is an appeal by the Supreme Liberty Life Insurance company and Savid Manson, respondents to the petition filed by the Chicago Trust Company of Chicago, as receiver, wherein an interlocutory order of injunction was entered on January 24, 1931.

Oscar Welson, as Auditor of Public Accounts of the State of Illinois, ex rel the People of the State of Illinois, filed a bill to dissolve the Roosevelt-Bankers State Bank, a banking corporation organized under the laws of the State of Illinois; that prior to that date, on August 2, 1930, said Auditor of Public Accounts appointed the Chicago Trust Company, of Chicago, as receiver for said Roosevelt-Bankers State Bank, and said receiver thereafter qualified by giving bond in the sum of \$100,000; that on August 19, 1930, an order was entered by the trial court confirming all the acts of the Auditor of Public Accounts and authorizing the Chicago Trust Company, as receiver, to collect all the debts, dues and demands belonging to the Moosevelt-Bankers State Bank; that

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Opinion filed May 13, 1931

This is an appeal by the Supreme Liberty Life Incurance company and Envid Manson, respondents to the petition filled by the company and Envid Manson, respondents to the petition filled by the tery crear of injunction was entered on January 24, 1951.

It separa from the recounts of the State of Illinois, Oscar Melson, as Auditor of Public Accounts of the State of Illinois, on the Patents of the State of Illinois, filed a bill to discolve under the laws of the State of Illinois; that prior to that date, on August 2, 1970, and Auditor of Pablic Accounts appointed the Campany, of Chicago, as received for said Accessed the bond in the sum of \$120,200; that on August 19, 1930, an order was asserted to color of the context of the State of State of State of the State of State of

on January 24, 1931, the Chicago Trust Company, as receiver for the Roosevelt-Bankers State Bank, filed a verified petition in the same proceeding praying that the Supreme Liberty Life Insurance Company and Savid Bancon, respondents named in said petition, answer said petition within the number of days to be determined by the court, and that they account for and pay over all the sums of money growing out of a certain commission contract, and that a temporary injunction issue immediately, and without bond, restraining and enjoining said Supreme Liberty Life Insurance Company from paying over certain renewal commissions from month to month to said David Manson, respondent.

It further appears from the petition filed in the above entitled cause that the petitioner, as receiver, obtained judgments against the biberty Foundation Finance Corporation and the Liberty Underwriters Company, Inc. but that neither of said companies has property or assets out of which said judgments, or either of them, can be satisfied, with the exception of the collateral to the notes of said Underwriters Company, which is of little value.

It further appears from the petition filed herein that the Insurance Company was obligated to pay the Liberty Underwriters Commissions aggregating (1,300 per month; that at the time the Underwriters produced the loan from the Roosevelt-Bankers State Bank it was agreed by said Liberty Underwriters and the said Insurance Company, with one Alexander Flower for said bank, that the commissions heretofore referred to should be assigned to Rdward Kallish as trustee by said Insurance Company, and that said trustee should in turn pay said commissions to said Flower, to be by him credited on the note of caid Underwriters, now in the possession of the receiver; that said payments were made in accordance with said agreement, until December, 1929, at which time it is alleged that Alexander Flower became indebted to said Insurance Company in the sum of \$22,000, and that the said

that the Supreme liberty life and that the Supreme liberty life and limit the Supreme liberty life and limit the sums of the sone of the sums of anesy growing out of a section constants contract, and that a section of the supreme liberty life lacurance Company from paying and enjoining said Supreme liberty life lacurance Company from paying over certain reasons account to acade Contracts.

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It further appears from the petition filed herein the term of the content of the

Mandon, a director of said Insurance Company, and that since October 15, 1939, said Insurance Company, and director of said Insurance Company purposed to said Insurance Company; that said Insurance Company diverted to its own use, by way of credits upon the note of said Alexander Flower to it the sum of approximately \$1300 each month; that on October 15, 1930, the said Insurance Company purported to sell, transfer and deliver the note of said Alexander Flower to one David Mandon, a director of said Insurance Company, and that since October 15, 1930, said Insurance Company has been paying said commissions monthly to said Manson to be applied upon the note of said Flower.

It further appears that it is the opinion of the receiver that the transaction between the parties named was fraudulent and for the surpose of benefitting Flower and defrauding the Roosevelt-Bankers State Bank.

Thereafter, on January 34, 1931, without notice and without bond, the court entered an order enjoining and restraining, until the further order of the court, the Supreme Liberty Insurance Company, its officers, agents, servants, attorneys and solicitors, from making any payments to David Manson upon the note of Alexander Flower, sold by the Supreme Liberty Life Insurance Company to the said Sunson, or any payments to said Davis Manson upon a certain renewal contract sold and delivered to him by the Supreme Liberty Life Insurance Company as collateral to Alexander Flower's note.

It is elementary that a court, in order to grant the relief prayed for in a bill or cross-bill filed in chancery, must have jurisdiction of the subject matter and of the parties, and the parties to the litigation should be properly in court, for it is axiomatic that the parties should have a day in court, and no decree can be entered in a suit in which the parties are not before the court. Shriver v. Day, 276 Ill. 403.

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It further appears that it is the emision of the and for the purpose of benefitting florer and defrauding the

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In the petition filed by the receiver in the instant case, there is not incorporated a prayer for the issuance of process to bring the respondents before the court. The only request made in the petition is that the respondente be ruled by the court to answer the petition within a day to be fixed.

The order entered by the court to the effect that the Supreme Liberty Life Insurance Company and David Manson make answer to the petition within ten days from the date of the filing of the receiver's petition, did not bring the respondents into court, and the court was without juriculation to enter a default for failure to answer as directed in the court's order, and, therefore, could not proceed to determine the issues as between the parties.

It is generally the rule that an injunction will only issue upon a bill or cross-bill upon proper charges and in a proper cause, but when a court of equity is already in possession of a couse and has jurisdiction of both the subject-matter and of the parties, it may enforce obedience to its mandate by an injunction issued merely upon the petition in the cause, without the filing of a bill. Nestern Cottage Pieno & Organ Co. v. Burrows, 144 /hpp.350.

that their rights may not be determined, as set forth in the petition, for the reason that they are not parties to the original suit. The court undoubtedly had jurisdiction of the subject-matter, that is, the assets of the estate of the defend at; and the purpose of the litigation is to wind up the affairs of the bank and collect the assets for that purpose and in a proper case the court may determine the rights of the parties upon that question.

"A receiver with the power and under the duty to collect assets may move for an order on a party to the suit who has interferred with his possession by collecting assets since the appointment, and may proceed summarily by petition for a rule to show cause in the court by which he was appointed to require one not a party to the suit to pay over money belonging to the receivership which

In the position filed by the receiver in the income of process to bring the respondence before the court. The only resuest made in the petities is that the respondence be respondented by the court to ensues the petities at that the security to be rised.

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has come into possession of the respondent since the appointment of the receiver." 34 Ency. of L. and F. 375.

It appears from the petition that the Supreme Liberty
Insurance Company, Flower, and Kallish agreed that insurance premiums
amounting to about \$1300 a month were to be applied by the Insurance
Company to the reduction of an indebtedness of Flower, who was a
director of the Roosevelt-Bankers State Bank. This sum was, by
previous agreement with the Supreme Liberty Insurance Company applied
to the reduction of the Liberty Underwriters Loan, a part of the
assets of the defendant bank.

The petition charges a conspiracy to deprive the defendant bank of this money by the agreement made with Flower, while an officer of the bank, and the Insurence Company, and that in order to carry out said conspiracy, the Flower note in possession of the Insurence Company was assigned and transferred to one Manson, who was a director of the respondent Insurance Company. Accordingly, if the parties are properly before the court, the court may mass upon the question as to whether the parties entered into a conspiracy to defraud the bank of its assets, and may compel the parties to account to the receiver.

before the court, the court had no jurisdiction over the parties, and from the fact that this court, as the record now stands, is unable to determine the questions involved, and also because of failure to give notice of the application for this temporary injunction, the court was without jurisdiction to enter the interlocutory order appealed.from.

It was surprising to this court when it examined the record to find that the receiver had filed its appearance, but had failed to file a brief. It would seem, in fairness to the trial court, as well as to the estate it represented, that it should at

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record to find that the receiver had filed its apparenace, but had failed to file a brief failed to file a brief court, in fairness to the trial court, as well as to the courte it reprocessed, that it should at

least have filed a brief, in order that this court might have such aid as a receiver could give.

For the reasons indicated, the interlocutory order entered by the court, granting a temporary injunction, is reversed and the costs assessed against the receiver.

REVERSED.

WILSON, P.J. AND FRIEND, J. CONOUR.

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AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present -- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

261 T.A. 653

BE IT REMEMBERED, that afterwards, to-wit: On
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



H. J. MYALK,

Plaintiff in Terms

va.

P. J. CLAUTED,

Error to the Circuit Court of La Salle County.

Defendant in Moreor

Jett, P. J.

v. J. leve e, mightiff in sever, ineligated this wilk before a justice of the some scales H. f. Lasking and F. I. Keating, daing business or continuously on, and the internal cer Tegistry and Insurance As aciation, Liuted, to recover 15.50 allered to here been need to continue then as aventua on a ceptain insurance alier name what was known as Del Monte Mardens of which the oldintiff in array was reneiver. On the trial before the justice of the peace a judgment was rendered against P. F. Lecting and F. . Testing for the said one of July. To, together with costs of sait. In appeal was prosecuted to the Diracit Court and before the trial in that Court, J. T. Looking departed this life. In the Otrout Court a jury was waived. The suit was dismissed so to .. T. Routing and the Universal Low to letter Association, Limited. The trial proceeded weinst F. J. Leuting, defendant in error. The Bourt from for the defendant in error and this writ of error was sued out by plaintiff in error.

Title and Remarks

THE RESIDENCE

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THE OWNER

THE RESIDENCE

PERSONAL PROPERTY.

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contract printing plants of a course of the first term of the course of

to have the transferred by had treated and deligible building worthing

Key heristry and Immirance Association, Limited, which indicated it car ied such risks. Defendant in error showed the communication to the plaintiff in error and the matter was discussed between them. Defendant in error suggested that he would write to the association concerning the insurance count to plaintiff in error. After correspondence the risks are second don't plaintiff in error width armium high Keating remitted. Later on defendant in error received pay from the company for his services.

It appears that the agency which had written defendant in error and arrows promuted the insurance in the four different or manies was located in ser albumy, Indiana. The communion that wrote the insurance were all foreign communion and were expended in foreign countries. They were not authorized to do business in Illinois.

The buildings of the property of which plaintiff in error was received were damped. Proofs of loss were submitted and the insurance or manise refused to pay on the ground that they had not received the premiums.

This suit is presented against defendant in error on the theory that he acted as an accest for the incurance communica which were not authorized to do business in this state and that he is thangefore liable for the re-moment of the oreignes to the alcintiff in error. The evidence fulls to establish the fact that the defectant in error so an egent of the commiss or that he held a seelf out to the plaintiff in error to be an agent. Plaintiff in error was thoroughly so usinted with the situation. He had been informed by the defendant in error that he respected no communica which amud carry the rick. When he received a letter from the Indiana array he was not setting for it or for any insurance company it represented. The record discloses that he gave the information to minimit in error only for what to it was worth and the plaintiff in error seted upon it with full h nowledge of the facts. Both the defendant in error and the "laintiff in error beer that exendent co confee sould not accept the housed and they wat have brown that the communica they were dealing with were of a speculative character. Whether or not the insurance companies received the premiums is of no

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"so dibray, Indiana. The community that a rote the insur-

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and no more all freductio parties becomes all file all f

hasey that as acted as an epock for trouvers emanated which he is bleved or authorized by do business in this crew and that he is bleved for the initial for the manifest to the claiming to the allebit the error. The evidence is the teneshibles the first that the defectant is across for an evidence is the commonless or that the teneshible the selection is a selection of the commonless or that the contract or the contract of the course of the contract of the course or across the defeat the contract the course the course of the contract of the course of the contract of t

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consequence here, or it to one detailed defendant in error made a resistance to the Insurance Accreiation. Settler it in tops distributed the president among the companies entitled to them is not shown by the record. The mere fact that the defendant in error was efterwarde wild a commission does not change the situation. It does not entitled the fact that he was the agent of the said insurance or uniter.

The trial the decision of the dirout court was right and the judgment is affirmed.

Judgment affirmed.

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ATE OF ILLINOIS,	1
SECOND DISTRICT	ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
said Second District of th	ne State of Illinois, and the keeper of the Records and Seal thereof, do hereby
ify that the foregoing is a	true copy of the opinion of the said Appellate Court in the above entitled cause
record in my office.	
	In Testimony Whereof, I hereunto set my hand and affix the seal of said
	Appellate Court, at Ottawa, thisday ofin the year of our Lord one thousand nine
	hundred and twenty
416—1M—5-28)	Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present -- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

261 I.A. 6532

BE IT REMEMBERED, that afterwards, to-wit: On MAR 5 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

CONTRACTOR OF TO SHARE THE

'sbruary, in d nine hundred and shirky-one,

District of the State of Illinois:

and the second second second second

Error to Circuit Court of

Minia Cotandahl,

The Condens Charles

va.

The Rockford Cab and Driveurself Inc., a corporation,

Plaintiff in error.

Jones, J:

An action on the case was instituted by light actable, plaintiff, aminst the lockford tob and oriverself fro., to secure for injuries received in a collision between an automobile in which she was riding and a totical belonging to defendant.

Jucy trial resulted in a variety and juicing for plaintiff.

The cale ermind relied upon for a ray part of cold havement is the civing of two instructions on boble of ricintiff, the first of Mich is as fellows: " The Court instructs the jury that if you believe in this case that the claimiff, Haie Techericall, has reven her one by a preponterance or spetter eight of the evidence, then in that event your verdict should be for the plaintiff, liste "establishi." This instruction should not have been given. Ubetantially the some instruction was criticised in Polloy v. Chicago Papid Transit Company, 345, Ill. 184, where it was said that, "Instructions similar to This one have been oriticised by this court in many cases. The instruction first at the that it is for the plaintiff to prove her once by the preconder mee of the evidence, and refers to the evidence bearing on mightiffle once without any statement so to what the case is or what it is necessary for her to enve, but it refers the shale asse to the fury without any limitations. It around the tray for the juny to toke any viet of minimitiff a same which they now fit to take and to arrive at a vertice for my resume which while one to them to be cofficient, without may rule to maide them. " not the wiving of such an instruction has generally been held not ground for

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wing time to Dustine a new most father become all winds and its class photograph of the contract of the parents and all these and will all ademinate forms out of specifical or at the . Einbroden' chil titlelele one the sale and the sift to deliver weakness so occurated on a got many sad payone and establing, then in this seems your sortion chair to for the middlesmost average the terms related that a let a late and the late of the terms and the late of verious i healeitine are misemperious of a Links and a morte you of your all the the course of the line against the forfoithm med and on aids as a disis section beat , and bide fold redrive damit as the retrieved will severe there at from a law ye equippliancer of the court was the executive of the constant and the ely ligisfe or torgond complete oil to evolut her parebles oil to sees within the characters of the dark his orea is an which it is . Off of some electronia and erecent it for a core. It yet our type cone ting with my one little birth me. It emends the inter the first time In a point of oil man your wind in some all title for to talk the appearance of cold of one Rain doils means an art deliver a te evine of parivar and and ".e will obtain his after your should be joined and me

reversing a judgment. (Erieger v. A. E. & G. R. R. Go., 242 Til. 544.)

The record instruction civen on behalf of the minimite? is also expressed, because if does not limit the slout of recovery to the regligence charged in the declaration and expitted a reowerv if the jury found the defendant was resilient, whether the particular needle ros was avered in the declaration or not. This instruction has been very fiten condemned, and the giving of it will generally be held to be revereible error. (Corring v. C. A.J. R. B. Ss., 980 Hl. 914; Wollow V. Chicago baid Tr mait On., curra.) Int in the instant case, the defendant was aqually in array. Its given instruction No. 1 told the here that before the plaintiff ontid genevey, the most prove by a recorderance of all the evidence that at he immediately before the collision in question, this servent of the defendant was multy of mah nagligenne, if any, as to contribute or cause the collision in mention." and that if who failed in make much proof, the jury must find the defendant not mility. This instruction directs a verilet and fails to limit the right of yearyery to the neclinence everred in the deal ration. The deferment has no right to people in of errors in the record which are attributable to it emuly with the claimtiff. (Fleming v. E. J. & E. Ry. Co., 275 Ill. 486: Brennen v. S. 4 S. Seel Commer, 241 Ill. Flor Freding F. M. Laute Strok Yards. 242 Ill. 444.)

The record in this case warrants an affirmance of the judgment.

Julge ent Affirmed.

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support of the these is taken by the first horse off. consecute the Administration and Employment and Administration and the name of the Administration and the Administ are a facilities. For the Committee will all become all each carried are project, manufactors belowing all hour out off \$1 weren said the section of the party o If he others are not the Character with one and and midwighted of the property of the party of Phone that made it with the little in a little in the litt Many areas and the first party and provide the first party and the before, the stee beautiful out to part of the land after sports and a service of the parents are a property of principles out suctor absorbles of an Paul Standard and Fig. 80. attend from the refiller open trafficulate and in temporal or it ignitives set " profinere of modellion pur some of militarion of the and ill occurs and built down would and flower down when he hadden against and but your address on party, they expended hardly a region on ridge wit wi rectors econsilar out of macroner to profe saw chalf of prices to obtain in this is not more set perfectly and the natural edition are an experience or a could be seen and and At more of the Life Control of the Property of the Property of the the street of an experience his bits and a local responsibility of the second street, and Tanto, Der id. 4861)

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STATE OF ILLINOIS,	·ss.
SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the	State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a t	rue copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.	
	In Testimony Whereof, I hereunto set my hand and affix the seal of said
	Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand nine
	hundred and twenty
	manda data on vaoj-
	Clerk of the Appellate Court
(88416—1M—5-28) 7	



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hop. NORMAN L. JONES, Justice.

Hor. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

261 I.A. 653

BE IT REMEMBERED, that afterwards, to-wit: On MAR 18 for the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



PEOPLE OF THE STA	TE OF ILLI	NOIS	3,	}		
	Defendant	in	Error			
∇s.			{	Error	to	
GRANVILLE MILLER,	,		- {		County (Court
	Plaintiff	in	Error		Lee	County.

BOGGS, J.

On October 25th, 1929, the State's Attorney of Lee County filed in the county court an information in three counts, charging plaintiff in error with possession and sale of intoxicating liquor, in violation of the Illinois prohibition law. To said information plaintiff in error entered a plea of not guilty. A trial was had, resulting in a verdict of guilty, on which judgment was rendered. Plaintiff in error was fined \$200 on the first and third counts, respectively, and was sentenced to the county jail for sixty days on the second count. To reverse said judgment, this writ of error is prosecuted.

The record in this case, except as to the evidence relied on in support of the verdict, is substantially the same as the record in People v. Bott, general no. 3274. In the Bott case, the evidence of sales of liquor was to the effect that they had been made by the wife of Bott, while here the evidence was of sales by plaintiff in error. The same errors are assigned on this record as in People v. Bott, and the same authorities are cited in support thereof.

For the reasons set forth in the opinion filed in People v. Bott, the judgment is reversed and the cause remanded.

Reversed and remanded.

AND DECEMBER AND DESCRIPTION OF

Flaintiff in Meron) Leo Joanty.

A PERSON

On October 25th, 1909, the Stree's Attorney of Lee County filed in the county court an information in three counts, charging plaintiff in error with possession and sale of intoxicating liquor, in violation of the Illinois wrohibition law. To said information plaintiff in error entered a plea of not suilty. A total was hed, resulting in a verdict of guilty, on which judgment was rendered. Plaintiff in error was fined \$200 on the first and third counts, respectively, and was sentenced to the county jail for sixty days on the second count. To reverse said judgment, this writ of error is prosecuted.

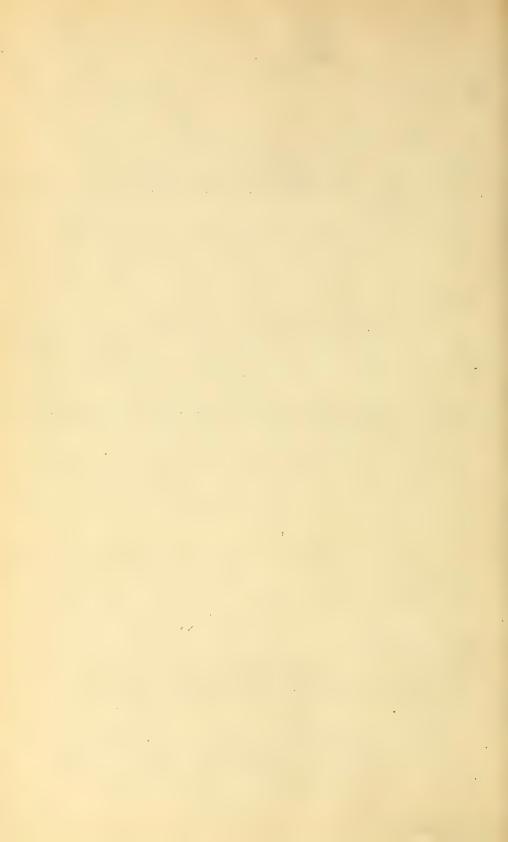
The record in this case, erosot as to the evidence relied on in support of the vertict, is substantially the same as the record in Papele v. Bott, general no. 8274. In the Bott case, the evidence of sales of liquor was to the effect that they had been made by the wife of Bott, while here the evidence was of sales by plaintiff in error. The same arrors are assigned on this record as in Papele v. Bott, and the same authorities are cited in support

For the reasons sat forth in the ominion filed in Peonla v. Bott, the judgment is reversed and the cause remanded.

Reversed and remanded.

FATE OF ILLINOIS,	Lss
SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
said Second District of t	he State of Illinois, and the keeper of the Records and Seal thereof, do hereby
rtify that the foregoing is a record in my office.	true copy of the opinion of the said Appellate Court in the above entitled cause,
	In Testimony Whereof, I hereunto set my hand and affix the seal of said
	Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand nine
	hundred and twenty
20416 135 5.003	Clerk of the Appellate Court
38416—1M—5-28) 7	

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AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

261 I.A. 6534

BE IT REMEMBERED, that afterwards, to-wit: On MAR 18 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



General Number 8287

Agenda Number 12

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in error

Vs.

ROBERT JONES,

Plaintiff in error.

Error to County

Court Lee County.

BOGGS, J.

On Movember 2, 1929, the State's attorney of Lee
County filed in the county court an information in three counts,
charging plaintiff in error with possession and sale of intoxicating liquor, in violation of the Illinois prohibition law. To
said information plaintiff in error entered a plea of not guilty.
A trial was had, resulting in a verdict of guilty, on which judgment was rendered. Plaintiff in error was fined \$200 on the first
and third counts, respectively, and was sentenced to the county
jail for sixty days on the second count. To reverse said judgment,
this writ of error is prosecuted.

The record in this case is substantially the same as the record in People v. Bott, general no. 8274. The liquor alleged to have been sold was charged to have been sold by plaintiff in error through his wife, the same charge having been made in People v. Bott. The same assignments of error are made in this case as in People v. Bott, and the same authorities are cited in support thereof.

For the reasons set forth in the opinion filed in People v. Bott, the judgment is reversed and the cause remanded.

Reversed and remanded.

THE RESERVE OF THE STREET OF THE STREET, STREE

Appeal of Septil

A .500UE

On Envember 2, 1982, the State's attorney of Lee County filed in the county court an information in three counts, charging plaintiff in error with possession and sale of interiorating liquor, in violation of the Illinois prohibition law. To said information plaintiff in error entered a plas of not guilty. A trial was had, regulting in a versict of guilty, on which judgment was rendered. Plaintiff in error was fined \$200 on the first and third counts, respectively, and was mentenced to the county jail for sixty days on the account count. To reverse said judgment, this writ of error is presented.

The record in this case is substantially the same as the record in Pearla v. Nott, general no. 8374. The liquer alleged to have been sold by plaintiff in error through his wife, the same charge having been made in People v. Bott. The same assignments of error are agge in this case on in People v. Pott, and the same authorities are agge in this case on in People v. Bott, and the same authorities are cited in support thereof.

For the reasons set forth in the opinion filed in People v. Bott, the judgment is reversed and the cause revended.

Reversed and remarded.

ATE OF ILLINOIS,	1
SECOND DISTRICT	ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
	the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
	true copy of the opinion of the said Appellate Court in the above entitled cause,
record in my office.	
	In Testimony Whereof, I hereunto set my hand and affix the seal of said
	Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand nine
	hundred and twenty
	Clerk of the Appellate Court
8416—1M—5-28) 7	



ATA TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tresday, the Third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present -- The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

261 I.A. 6535

BE IT REMEMBERED, that afterwards, to-wit: On APR 20 1931 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



In the Appellate Court

of Illinois

Second District

Octo her Term, A.D. 1930

Frank M. Ryan, Trustee under the Last Will and Testament of Terrence E. Ryan, deceased, Frank M. Ryan, individually, Lola O. Ryan, his wife, Harriette F. Ryan, Terrence E. Ryan, Jr., and Emily M. Ryan,

Appellants,

Appeal from the Circuit Court

of Kane County.

VS.

Mary A. Landon and John W. McQueen, Trustee,

Appellees,

OPINION by BOGGS, J.

On August 9, 1927, appellees filed a bill in the Circuit Court of Kane County against appellents, one John W. Chaffee, Trustee, D. A. Green, successor in trust, and the St. Charles Charities, to foreclose a trust deed on certain described premises in said County given to secure a note for \$22,700, signed by appellents and held by appellee Mary A. Landon. Said bill wet forth that a portion of said premises were subject to a first mortgage or trust deed to John W. Chaffee, Trustee, securing a note in the sum of \$20,000, held by the St. Charles Charities.

An answer was filed to said bill by appellants. Chaffee, Green and St. Charles Charities, also answered said bill, admitting that their rights and interests under said trust deed were correctly set forth in said bill, and praying to be dismissed, etc. Replications were filed to said answers by appellees. A cross bill was filed by appellants, praying certain relief against appellees, to which answers were filed.

The cause was referred to the master to take the evidence and to report the same, with his conclusions. The evidence taken and reported by the master discloses that prior to the filing of said bill there had been paid on said note the sum of

Toll head broken

October Term, A.D. 1980

Appeal from the

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of Kene County.

Mary E. Laures and community of the community of the communities of th

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OPINION by BOGUS, J.

On Aurust 3, 1927, appelleds filed a bill in the Circuit 1, t of Kane County against appellents, one John W. Chaffee, T. 12 to 1. A. Green, successor in trust, and the St. Charles the site, to foreclose a trust deed on certain described premises in said County given to seeme a note for \$23,700, signed by morellants and held by appellee Mary A. Landon. Said bill wet for that a portion of said premises were subject to a first cortange or trust deed to John W. Chaffee, Trustee, securing a cortant in the sum of \$20,000, held by the St. Charles Charities.

An answer was filed to said bill by appallants. Chaffee, dreed and St. Charles Charities, also answered said bill, admitting to ut their rights and interests under said trust deed were correctly set forth in said bill, and praying to be dismissed, etc. Replications were filed to said answers by ampelless. A cross bill was allowers were filed.

The ocuse was referred to the master to take the evidense of the country of the content of the

\$396.32. After the filing of said bill, there was paid by appellants the further aggregate sum of \$13,849.75. The master found and reported that, with the accrued interest, there was due to appellee Mary Landon \$12,312.03. A decree of foreclosure was entered in accordance with the findings of the master, and a solicitor's fee of \$1,000 was allowed to complainants' solicitors. Thereafter, on motion of the solicitors for the holders of said first mortgage, the court ordered that a fee of \$50.00 be allowed to said solicitors. To reverse said decree, this appeal is prosecuted.

It is first contended by counsel for appellants that the court erred in allowing said solicitors' fee of \$1,000. The trust deed in question provided in effect that, upon the filing of a bill to foreclose said trust deed, there should be allowed to the holder of said note a reasonable attorneys' fee, and further provided that if, after the filing of such bill, the indebtedness was paid, then "one-half of the attorneys' fee above stipulated" should be allowed.

The bill sets forth said provision of the trust deed, and prayed for the allowance of solicitors' fees. On the hearing before the master, one Emil Benson was called as a witness by appellees and testified in effect that he was a practicing attorney; that he was familiar with the usual fees in foreclosure matters, and that a reasonable fee in this character of case would be from \$1,000 to \$1,500. This was the only evidence offered on the hearing on said motion.

It is contended by counsel for appellants that, in view of the substantial payments made on said indebtedness, and in view of the provision of said trust deed for the reduction of the attorneys' fees where payment had been made after the filing of a bill to foreclose, said fee is excessive, and that the court of its own motion should reduce the amount thereof.

The provisions in said trust deed warranted the court in granting appellee's motion for the allowance of a solicitors' fee. Cohen v. Northwestern Life Ins. Co., 185 Ill. 340; Haldeman v. Mutual Life Ins. Co., 120 Ill. 390-393; Heffern v. Gage, 149 Ill. 182-191. Appellees having offered competent evidence

reported that, with the scored interest, there was alles Mary Landon \$17,712.03. A decree of foredlesure of the distance with the findings of the center, and a color of see of \$1,000 was allowed to complainable coloriors.

"If a reported of the selicitors for the holders of seid the court creamed that a fee of \$50.00 he allowed that a fee of \$50.00

It is first contended by counsel for excellents that the court erred in allowing said solicitors' for of \$1,000. The trust in the provided in effect that, woon the filing of a bill to foreclose said trust deed, there should be allowed to the vided that if, after the filing of such bill, the indebtedness was paid, then "one-balf of the atterneys" fee above stipulated" should be allowed.

The bill sets farth said provess.

prayed for the allowence of solioitors' fees. On the hearing before the master, one Smil Benson was called as a witness by appelless and testified in effect that he was a practicing attorney; that he was familiar with the usual fees in foreclosure matters, and that a responsible fee in this character of case would be from \$1,000 to \$1,500. This was the only evidence offered on the hearing on said motion.

It is contended by counsel for appellants that, in view of the substantial payments made on said indebtedress, and in view of the provision of anid trust deed for the reduction of the attorneys' fees where payment had been made after the filling of a bill to foreclass, said fee is exceptive, and that the court of a bill to foreclass, said fee is exceptive, and that the court

The provisions in soid trust deed verronted the court in granting exceller's motion for the allowance of a solicitors!

Ice. Cohen v. Northwestern Life Ins. Co., 185 111. 540; Haldeven v. Mutuel Life Ins. Co., 180 111. 550-583; Heffern v. Grge,

140 111. 185-191. Appelless having offered competent evidence

as to what would constitute a reasonable fee, and there being no evidence to the contrary, the court would not be warranted in disregarding the same, unless such fee were so excessive that the court would be compelled to hold the same unreasonable.

Nathan v. Brand, 167 Ill. 807-809; Cohen v. Northwestern Life Ins. Co., supra, 3411 Burns v. Turnes, 207 App. 181-185. On the record in this case, there was nothing to warrant the court in holding said fee unreasonable. The court therefore did not err in allowing the same.

It is next insisted that the court erred in allowing to the solicitors representing the trustee and the holder of the indebtedness secured by said first trust deed, the sum of \$50.00 as solicitors' fees. It is insisted that, inasmuch as the rights and interests of the holders of said indebtedness were correctly set forth in the original bill, the court should have dismissed said parties, and that there would then have been no occasion for the allowance of a solicitors fee.

Appellants are not in a position to successfully urge this assignment of error for the following reasons:

- (1) They have not made said trustee nor the holder of said note parties to this appeal.
- (2) They have not, by their abstract, set forth the provisions of said trust deed with reference to the allowance of solicitors' fees, so this court might determine the propriety of said order.
- (3) Said order is not a part of the decree which is sought to be reversed in this proceeding.

For the reasons above set forth, the decree of the trial court will be affirmed.

Decree affirmed.

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Appellints are not in a position to encosestully urge this assignment of error for the following reacons:

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- (2) They have not, by their electron, was forth the provisions of said trust deed with reference to the allowance of solicitors' fees, so this other with determine the propriety of soid over.
 - (5) Seit order is now a part of the decree which is

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TATE OF ILLINOIS,	ss.
SECOND DISTRICT	I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
r said Second District of th	e State of Illinois, and the keeper of the Records and Seal thereof, do hereby
	true copy of the opinion of the said Appellate Court in the above entitled cause,
record in my office.	
	In Testimony Whereof, I hereunto set my hand and affix the seal of said
	Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand nine
	hundred and twenty
	Clerk of the Appellate Court
88416—1M—5-28) — 7	



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of Eebruary, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On

1931 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



Gen. No. 8314

Agenda No. 15

In the Appellate Court of Illinois Second District

February Term, A. D. 1931

Lenora L. Hughes, Administratrix of the Estate of Georgie Lee Hughes, deceased,

appellant

Appeal from the Circuit Court of Peoria County.

VS.

appellee.

OPINION PER CURIAM:

Edward Prather,

Appellant, administratrix of the estate of Georgie Lee Hughes, deceased, instatuted an action on the case against appellee in the circuit court of Peoria County to recover the pecuniary damages alleged to have been suffered by the next of kin of said deceased, growing out of an automobile accident, charged to have been the result of negligence on the part of an agent of appellee.

On November 15, 1929, appellee, on limited appearance, filed a plea to the jurisdiction of his person. On January 18, 1930, by agreement of parties, leave was given appellee to amend said ple a. On January 29, 1950, leave was given appellee to withdraw said plea and to file an amended plea instanter. On motion of appellant, the demurrer then on file was extended to the amended plea filed on that day. Said demurrer was overruled, and leave was given appellant to reply within ten days.

On February 4, 1930, an alias summons was issued, directed to the sheriff of said county, and on February 28, 1930, was returned "not found". Upon praecipe filed by appellant, a third summons was issued on March 17, 1930, returnable at the May term, 1930, which was personally served on appellee on said day.

On May 10 a plea to the jurisdiction was filed by appellee attacking the validity of the service under the summons of March 17. On September 12 leave was given appellee to withdraw his plea filed on May 10, and to file a motion to quash the summons issued March 17 and the return thereon. Said motion was supported by affidavit,

Appeal from the Circuit Court

of Peoria County.

the Appellate Court of Illinois

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l. : I. Hughes, Administratrix of

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V.

THE PERMIT,

appellee,

: ILLINO THE MODERNE

Appellant, administratrix of the estate of Georgie Lee Mughes, deceased, instituted an action on the case against appellee in the ofronit court of Poorta County to recover the pecuniary damages alleged to have been suffered by the next of kin of said deceased, growing out of an automobile accident, charged to have been the result of negligence on the part of an egent of appellee.

On Movember 15, 1920, appellee, on limited appearance, filed a plea to the jurisdiction of his person. On January 16, 1950, by agreement of parties, leave was given appellee to smend said plea. On January 29, 1950, leave was given appellee to withdraw said plea and to file an amended plea instanter. On motion of appellent, the last than on file was extended to the amended plea filed on that day. Said demurrer was overruled, and leave was given appellent to reply within ten days.

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setting forth the matters and things shown by the record. Said motion was allowed, and said writ and the return thereon was quashed. Thereupon appellant withdrew her leave to reply to the plea filed January 30, 1930, and elected to abide her demurrer to said plea. The court adjudged "that the said plaintiff, Lenora L. Hughes, administratrix of the estate of Georgie Lee Hughes, deceased, take nothing by her suit, and that the defendant, Edward Frather, go hence without day, and have judgment of costs against said plaintiff."

To reverse said judgment, this appeal is prosecuted.

The grounds relied on by appellant for a reversal of said judgment, are set forth in her brief as follows:

- "(1) That the court erred in overruling the plaintiff's demurrer to the second amended plea to the jurisdiction.
- "(2) That the court erred in sustaining the defendant's motion to quash the alias pluries summons issued March 17, 1930, and the return thereon, and in quashing the same.
- "(3) That the court erred in entering judgment in bar and for costs against the plaintiff."

The plea in question is as follows:

"Edward Prather, in his own proper person, comes and appears specially for the purpose of this amended plea only, and says that before and at the time of the commencement of said action of the said Lenora L. Hughes, Administratrix, he, the said Edward Prather, was, and from thence hitherto has been and still is, residing in the County of Marshall, in the State of Illinois, and not in the said County of Peoria; that the alleged service of process in the above entitled cause was had upon him, the said Edward Prather, while he was in attendance upon the trial of a law case entitled Lenora L. Hughes, Administratrix of the Estate of Georgie Lee Hughes, deceased, versus the White Truck Line Company, which said cause was then being heard in the Circuit Court of Peoria County; that he, the said Edward Prather, was at the time of the commencement of said suit and from thence hitherto and still is the President of the White Truck Company which was sued in said cause under the name of the White Truck Line Company; that he appeared in said court afor esaid as president and acting for and in \$10 behalf of said company of which

The front a real on a colon of real at follows:

- "(1) That the court erred in overruling the plaintiff's of more to the jurisdiction.
- "(2) That the court erred in sustaining the defendant's thin the court out in quashing the same.
 - "(3) That the court erred in entering judgment in bar and for costs against the plaintiff."

The plea in question is as follows:

"Edward Franklor, in the out moses whom, not were specied Jade sire the . Int at to but and a success off for yellate or off to a circulation of the common of all actions of the seasoned said Lenora L. Hughes, Administratrix, he, the said Edward Prather, wee, and recommend to be a selled in residing in the County of Marchell, is the Coltant of Illiants, and not as the and because In anti-cas hand the all land interes he where him above entitled course and and some being the entitled tenter. beltithe ease wal a'To lairt ent nogu sonsbnetts ni aw on elidw I mura L. Hughos, Administratrix of the Estate of Georgie Lee Mughes, decement, vermus the olite i not item draper, which ands ands me then being heard in the Circuit Court of Peorla County; that he, tho said Edward Prather, was at the time of the commencement of said sult and from Director all still to the Freedont of the Truck Company which was sued in said cause under the name of the White Tenck Line Company: that he superied in maid court storests Mod . To part of him to the had the side was made and continue as

he is practically the sole owner; that at the time of the trial aforesaid and previous thereto he was the executive of the company; and for the further reason of showing the fact that the White Truck Ompany was sued in said cause under the name of the White Truck Line Company: that he was a witness and did testify in said cause to that effect, and that said cause resulted in the plaintiff's amending the name of the defendant in Line said cause from the White Truck/Company to The White Truck Company: that while he was so in attendance upon said trial in the court room in Peoria County, and during the progress of said trial and while the Honorable A. Clay Williams, judge of said court was upon the bench hearing said law cause, a deputy sheriff of Peoria County served the summons in the above entitled cause upon him, the said Edward Prather, and that no other writ or summons in this cause has ever been served upon him that the said action is not a local action, and that he, the said Edward Prather, was in said County of Peoria at said time for no other purpose than to attend upon the trial of said cause and had no occasion or reason to be in said County of Peoria other than as a material witness in said cause as above stated: and this the said Edward Prather is ready to verify; wherefore, he prays judgment if the court will here take cognizance of the action aforesaid."

In support of the first ground relied on by appellant, it is insisted that she the cause on hearing at the time appellee was first served was against the White Truck Line Company; that appellee was not an officer of said company nor a party in interest and did not claim to know "any of the material facts which might become evidence in such trial"; that a judgment against said corporation would not have injured appellee; that after the White Truck Company was made the defendant to said suit; appellee, as the president thereof, was not a party in interest, and was not subpoenaed as a witness; that his coming into said county was purely voluntary and he was therefore legally served and the court erred in overruling the demurrer to said plea.

A non-resident suitor is privileged from service of legal process in civil actions while attending upon the trial of

Managard and America, Manetic In tea Tile selection of the America and the first set in the second public the second process. to seem and principles of the college and the see the college at his All the Period Line Secretary like in case, electrical and the are Almos films July has a station fold at any of the of the at all the at out to the plaintiff's amending the name of the defendant THE THE PERSON Chicar evil to I to I acces fice Company: that while he was so in attendance moon said trial to assume and reliable to around arrive of once from set of said trisl and while the Honorable A. Clay Williame, tudge of said court was upon the bench hearing said law cause, a deputy sheriff of Pearia County served the summons in the above entitled cause woon him, the said Edward Prather, and that no other writ or summons in this cause has ever been served upon him that the said action is not a local action, and that he. the said Edward Prother, was in said County of Peoria at said to Isint of nece busts of ment execute redte on rol emit said cause and had no eccasion or reason to be in said County and an interest are designed as a contract sufficient to above stated; and this the said Bidward Prather is ready to verify; wherefore, he prays judgment if the court will here take cognizance of the action aforesaid."

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a cause in a county other than that of his residence. Gregg v. Summers, 29 App. 110; Beatty v. Monohan, 240 App. 240-242.

While counsel for appellant practically concedes the correctness of the foregoing rule, it is insisted that, in order for said rule to apply, the party served must be in fact a named party to the suit.

The plea sets forth that appellee was not only the president of said White Truck Company, but that he was the sole owner of practically all of its stock and that he was the executive of the company. While no case has been cited, and we have found none exactly in point, we hold that where, as here, the party served is in effect the sole owner of the stock of the corporation sued, and the manager or executive thereof, he should be immune from service of civil process while in attendance on such trial, and for a reasonable time in coming and going.

While pleas in abatement, strictly speaking, are not amendable, pleas in abatement in the nature of pleas to the jurisdiction of the court of the person are amendable.

Spencer v. Aetna Indemnity Co., 231 Ill. 82-85. A plea of this character is held to be not strictly a plea in abatement, but a meritorious plea, necessary to the protection of a substantial right granted by statute, and in such case the plea is amendable. Safford v. Sangamo Ins. Co., 88 Ill. 296; Drake v. Drake, 83 Ill. 526; Humphrey v. Phillips, 57 Ill. 132; Midland P. Ry. Co. v. McDermott 91 Ill. 170. Under the foregoing authorities, we hold that the court did not err in overruling the demurrer to said plea.

It is next insisted that the court erred in sustaining the defendant's motion to quash "the alias pluries summons issued March 17, 1930, and the return thereon."

Section 4 of the Practice act provides:

"Whenever it shall appear by the return of the sheriff or coroner that the defendant is not found, the clerk shall, at the request of the plaintiff, issue another summons or capias, as the case may be, and so on until service is had."

The summons issued March 17 was issued on the praecipe of appellant. Counsel for appellant does not seriously rely

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Section 4 of the Practice act provides:

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on the return "not found" on the second summons, but insist that, inasmuch as the court overruled the demurrer to appellee's plea to the jurisdiction, such holding in effect amounted to a "not found" on the first summons, and that, under the provision of said section 4, appellant therefore had the right to have additional summonses issued until service could be had. No authority was cited by appellant sustaining this position.

In Daley v. City of Chicago, 295 Ill. 276, a summons had been issued and delivered to the plaintiff's attorney. It was held by him for four years, when it was surrendered to the clerk and a new summons was issued. At page 278 the court says:

"By section 1 of the Practice act the first process
was a summons directed to the sheriff and made returnable the
first day of the next term. By the second section it is made the
duty of the sheriff, when practicable, to serve the writ ten days
before the first day of the return term and return the writ to
the clerk with the indorsement of service. Section 4 provided:
'Whenever it shall appear, by the return of the sheriff or coroner,
that the defendant is not found, the clerk shall, at the request
of the plaintiff, issue another summons or capias, as the case
may be, and so on until service is had.' It is very clear the
clerk would have had no authority on the mere request of the
plaintiff to issue the alias writ, and this was apparently recognized by plaintiff in procuring the indorsement of the court
on the original summons directing that an alias writ issue."

Under the foregoing authority, we hold the summons of March 17 and the return thereon was properly quashed as the clerk had no authority to issue the same. We further hold that the overruling of the demurrer to appellee's plea did not amount to a "not found" as contemplated by said statute. Appellee was found in the county, but under our holding, as he was served while attending on the trial of a case, he was immune from service.

It is next insisted that the court erred in entering a judgment in bar of action and for costs.

The judgment entered was not in bar, and is not so contended for by counsel for appellee. The judgment, however, should

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March 17 and the return thereon was properly quashed as the clerk had no authority to issue the same. We further hold that the control of the condition of the condition.

Under the foregoing authority, we hold the summons of

a judgment in bar of action and for costs.

The judgment entered was not in bar, and is not so con-

have been that the writ be quashed. Motherell v. Beaver, 2 Gilm 69-71; Eddy v. Brady, 16 III. 306-308; Cushman v. Savage, 220 III 330; Spaulding v. Lowe, 58 III. 96-97; Schomide v. Brewerton, 306 III. 365; Hill v. Trapp, 206 App. 272-274.

In Cushman v. Savage, supra, the court at page 330 says:

"In this case there was mp a plea in abstement of the jurisdiction of the court, the plaintiff residing in La Salle County and
the defendant in the County of Cass. To the plea the plaintiff demurred. It was overruled and the court granted plaintiff leave to
reply. This was erroneous. After a demurrer to a plea in abatement has been overruled, it is not regular for a court to grant
leave to peply; for a judgment for a defendant on such a plea,
whether it be on an issue of fact or of law, is that the writ be
quashed."

In Spaulding v. Lowe, supra, an action in assumpsit was brought by Cynthia A. Spaulding and another in the circuit court of Sangamon county against Francis Lowe and Alonzo Glenn. A summons was directed to Mason county, where service was had. The defendants appeared and filed a plea in abatement to the jurisdiction of the court. A general demurrer to said plea was overruled, and plaintiff, by leave of court, filed a replication. The court at page 97 says:

"It was error in the circuit court to give leave to reply after overruling a demurrer to a plea in abatement. This court has several times held this error to be cause of reversal.

McKinstry v. Pemmoyer, 1 Scam. 319; Motherell v. Beaver, 2 Gilm 270. See also Eddy v. Brady, 16 Ill. 306. The error was not waived by anything subsequently done by de endants. The judgment must be reversed, the verdict set aside and judgment quashing the writ entered nunc pro tunc upon the demurrer."

In Schomide v. Brewerton, supra, the court at page 366 says:

"Frank Schomide began an action on the case for personal
injuries against W. A. Brewerton and three others in the circuit
court of Sangamon county and were served with process therein.
Brewerton was a non-resident of Sangamon county and was served
with process in Cook county. Defendants appeared and filed the
general issue. On the trial, at the close of the plaintiff's case,

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"In this case, the planainf recining in La Solle Source the plaint in the County of Case. To the plea the plaint."

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In Schomide v. Erewerton, supra, the court at page 586 ears:

"Frank Schowide began an action on the case for personal injuries against W. A. Brewerton and three others in the circuit court of the court of the circuit of the circuit of the county. Defendants appeared and filed the general ince. on the county.

each of the defendants except Brewerton made a motion that the court instruct the jury to find him not guilty and the motions were allowed. Thereupon Brewerton, the remaining defendant, entered a motion that the service had upon him be quashed and the action dismissed, since he was a resident of Cook county. This motion was denied, and evidence was introduced on behalf of the defendant. A verdict was rendered, finding him guilty and assessing the plaintiff's damages at \$750.00."

One of the points raised against Brewerton was that the motion to quash was not made in apt time. The court at page 369 says:

"Plaintiff in error could not make a motion to quash the summons or service at an earlier time. It would doubtless have been more in conformity with technical rules of practice to obtain leave to withdraw the plea of the general issue and to plead to the jurisdiction, but in this case there was no disagreement about the facts. They are conceded in the brief of the defendant in error. The court was advised of them as fully as if they had been set out in a plea, and should have acted in conformity with the real rights of the parties, by quashing the service of summons. The plaintiff in error had no right to have the suit dismissed. He may be served with an alias summons, should he be found in the county. The judgment will be reversed and the cause remanded to the circuit court, with directions to quash the service of summons."

Under the foregoing authorities, the judgment of the court, on appellant electing to abide her demurrer to appellee's plea to the jurisdiction, should have been that the writ be quashed.

Lastly it is insisted that, by obtaining leave to amend his plea to the jurisdiction, appellee submitted himself to the jurisdiction of the court. In Pooler v. Southwick, 126 App. 264, this court at page 267 in discussing a matter of this character said:

"A plea to the jurisdiction of the court is amendable and our liberal statute of amendments applies fully thereto. Midland Pacific Ry. Co. v. McDermid, 91 Ill. 170; Drake v. Drake, supra.

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"Plaintiff in error could not make a artion to quach the been more in conformity with tochnical rules of practice to obtain y withdraw the plea of the general issue and to plead to judicition. The plead of the general issue and to plead to error. The court was givined of them as fully been set out in a plea, and should have acted in conformity with the plaintiff in error had no right to have the service of summans. The plaintiff in error had no right to have the service of summans the county. The judgment will be reversed and the be found in the county. The judgment will be reversed and the service of summans."

Under the forersing sutnorities, the judgment of the court, on appellant election to abide her desurrer to appelled a pleasure to the juriediction, should have been that the writ he consher.

Lastly it is traisfied that, by obtaining leave to mend his plea to the jurisdiction, appelles submitted himself to the jurisdiction of the court. In Pooler v. Southwick, 126 App. 364, this court of the character this court of this character said:

Hence a motion for leave to amend such a plea cannot be said to be a general appearance giving the court full jurisdiction. Such a rule would defeat the right to amend, for leave to amend can only be obtained by a motion to the court. It would be a contradiction in principle to hold that one may amend a plea to the jurisdiction of the court, but that if he asks leave to do so he thereby defeats the plea and gives the court full jurisdiction."

An examination of the record discloses that appellee at all times was limiting his appearance on the motions he was making, and did not thereby enter his appearance generally.

Counsel for ampellee insisted in his argument that the judgment of the trial court had the effect of abating the present suit brought against him in Peoria county, but not that it was a judgment in bar, his contention being that he was entitled to be sued in his own county. Under the holding in Schomide v. Brewerton, supra, the judgment of the court should have been that the writ be quashed, but appellee was not entitled to have the suit dismissed.

The judgment is therefore reversed and the cause remanded to the circuit court, with directions to quash the service of summons.

Reversed and remanded with directions.

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Jude and of the still the supra, the judement of the court should have been that the writ be quashed, but concllee was not entitled to have the still it steed.

The judgment is therefore reversed and the same remanded

. Reversed and remanded with directions.

TATE OF ILLINOIS, ss.
SECOND DISTRICT J. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in an
or said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do herelectify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause
of record in my office. In Testimony Whereof, I hereunto set my hand and affix the seal of sa
Appellate Court, at Ottawa, thisin the year of our Lord one thousand ni
hundred and twenty
Clerk of the Appellate Court



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General No. 8500

Agenda No. 12

January Term, A. D. 1931

LILLIE B. TURNEY, Executrix of the Will of Sarah J. Tolson, Deceased, Defendant in Error,

vs.

RICHARD TOLSON, Plaintiff in Error.

Error to The Circuit Court, Shelby County.

ELDREDGE, J.

Lillie B. Turney, executrix of the will of Sarah J. Tolson, deceased, defendant in error, procured a judgment by confession in vacation in the Circuit Court of Shelby County for the sum of \$1,090.11 against Richard Tolson, plaintiff in error, on a judgment note dated February 23, 1921 for the principal sum of \$700.00 and bearing interest at 7 percent from date, payable to the order of Sarah J. Tolson and executed by plaintiff in error.

Plaintiff in error filed a motion to open up said judgment and for leave to plead and also filed an amended motion. In support of the amended motion an amended affidavit was executed by plaintiff in error. The amended motion makes the affidavit filed in support thereof a part of said motion. The amended motion was overruled. The enumerated points in the amended motion are as follows:—

(1) That the declaration filed is a declaration in favor of



Lillie B. Turney individually while the note filed is payable to the order of Sarah J. Tolson and is unassigned.

- (2) The defendant owes nothing to the plaintiff in her individual right; that the note is payable to Sarah J. Tolson and not to plaintiff.
- (3) That the affidavit of signature was executed before J. E. Dazey, notary, who was also the attorney for the plaintiff.
- (4) Defendant has full and complete idefense of set-off to the note attached to the declaration.
- (5) That said judgment because of defects in the declaration, cognovit and affidavit, and the variance between the declaration and note, is void.

In the affaidavit which is made a part of the amended motion it is averred that Sarah J. Tolson was the mother of plaintiff in error who died testate July 18, 1927, and letters testamentary were issued to Lillie B. Turney under her will; that Lillie B. Turney is a daughter of Sarah J. Tolson, deceased; that Sarah J. Tolson in her life time was indebted to plaintiff in error for money loaned and advanced to her since the execution of the note which as a total exceed the principal and interest on the note owing to said Sarah J. Tolson at her death; that at the time of her death plaintiff in error had a set-off against said note more than sufficient to pay



it entirely; that he was at the time of her death indebted to her in no sum whatever; that said payments were made during the years 1921 to 1926, both inclusive, and a small part in 1927; that at this time plaintiff in error cannot give the items of said payments in detail for the reason that certain of his papers have been misplaced but that certain of said items are,-insurance paid to M. S. Ayars, \$60.00; two hogs, \$84.78; money paid for deceased in connection with her conservatorship litigation, \$125.00; fee of Dr. Sparling, \$35.00; coal furnished, \$4.50; cash paid out for deceased, \$90.00; and other like items which will total in excess of the note at bar and its interest; that the taking of the judgment was a surprise to plaintiff in error; that the attorney for plaintiff had written affiant demanding payment of the note; that thereafter plaintiff in error talked over the phone with Lillie B. Turney, the executrix, and understood from her that she had not instructed judgment to be taken and would not let judgment be taken; that plaintiff in error is advised the note at bar is not the property of Lillie B. Turney, individually; that the attorney who acted as notary in the affidavit of signature is the same person who is the attorney signing the declaration; that the term during which in vacation this judgment was taken has not yet adjourned, etc.

It is elementary that in order to justify a Court in opening



up a judgment by confession it must clearly be shown that the judgment debtor has a defense which if proven would show that he does not owe the debt. It is also elementary that a Court will never open up a judgment to permit a defense of set-off. The pleadings and the affidavits show beyond dispute that plaintiff in error executed the note in question payable to the order of Sarah J. Tolson who is now deceased and that Lillie B. Turney is executrix of her will. As such executrix she became entitled to the possession of the note and had power to enter up judgment. The vital question for consideration on motions of this kind is whether the defendant owes the debt. At most the affidavit filed by plaintiff in error sets up only a partial defense to the debt. If he has any valid claim against the estate of Sarah J. Tolson, deceased, he has his remedy by filing and proving the same therein.

The judgment of the Circuit Court is affirmed.



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General No. 8451

Agenda No. 14

October Term, A. D. 1930

A. E. Hudson, doing business as A. E. Hudson Company (not incorporated), Appellant

vs.

Road District Number 6 of Morgan County, Illinois, Appellee

Appeal from Morgan

NIEHAUS, J.

This is an appeal from a judgment rendered by the circuit court of Morgan county in the case of A. E. Hudson doing business as a A. E. Hudson Company, plaintiff and appellant, against Road District Number 6 of Morgan County, the defendant and the appellee, in bar of the plaintiff's suit and against his right to recover.

The record discloses that the plaintiff bases his right of recovery on the averments of a declaration containing the common counts, and an affidavit of claim. The record further shows, that the plaintiff was ruled to file a more specific bill of particulars; and thereupon that motion made by the defendant for a rule to file a more particular bill of particulars was denied by the court. And that thereafter the defendant filed a plea of the general issue and an affidavit of merits; and that the defendant's affidavit of merits filed with the plea, was stricken; and that thereupon the Court gave the defendant leave to file an amended affidavit of merits; and the court after that also gave the appellant leave



to amend his bill of particulars. Finally the record discloses, that the cause was heard by the court upon the declaration, the amended bill of particulars and the plea of the appellee, and the amended affidavit of merits filed by the defendant in support thereof; and that the motion of the appellant to strike the plea of the appellee for want of sufficient affidavit of merits in support of its plea was denied by the court; and that the plaintiff elected to stand by his motion to strike the plea and amended affidavit of merits; and thereupon the court ordered and adjudged that the appellant herein take nothing by his suit against the appellee, and that the appellant pay the costs of the suit, which was in legal effect a judgment in bar to a recovery by the appellant.

Error is assigned on this judgment rendered in bar of plaintiff's suit and for costs against him. Various questions are raised concerning the pleadings and the merits of plaintiff's cause of action, which in the condition of the record are not necessary to consider or pass upon. It is sufficient to point out, the merits of the controversy were not properly before the court for consideration nor final judgment. The denial of motion of plaintiff to strike the plea and the affidavit of merits left certain issues which were raised by the pleadings, and were questions of fact to be disposed of by a jury, upon a trial of the case. It was not within the province of the court to pass upon these issues of fact;



nor to render a final judgment upon the issues of fact involved.

We conclude therefore, that the judgment rendered is erroneous; and it is therefore reversed and the cause remanded for further proceedings.

Reversed and remanded.

abstract filed - april 14, 1931

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201 I.A. 654

General No. 8464

Agenda No. 23

October Term, A. D. 1930 NOAH ROTH, Appellee, vs. CARRIE GRESHAM, Appellant.

Appeal from Calhoun.

NIEHAUS, J.

In this case an appeal is prosecuted by the appellant Carrie Gresham from a decree of the Circuit court of Calhoun county foreclosing the lien of a mortgage on an 80 acre farm owned by her. The mortgage referred to, was made on March 18, 1927, to secure a promissory note for \$1300.00 to Grant Gresham, the husband of appellant, in conformity with and as the result of a settlement of property rights between husband and wife after a separation had taken place between them.

Appellant makes the following statement in the brief concerning this settlement: 'By agreement the appellant and her husband were each to assume one half of a \$1500 debt to the Bank of Hamburg, and appellant was to allow her husband \$550.00 for his dower interest in the 80 acre farm and was to allow him the sum of \$750.00 for the personal property, goods and chattels, that were then situated and used in operating the farm. The aggregate of said sums (\$1300.00) to be evidenced by a note of that amount, and secured by a mortgage on the farm; appellant's husband, said Grant Gresham, to execute and deliver to appellant his deed



to his dower in the farm and a bill of sale for the aforesaid personal property.'

The appellant also states that, "Appellant immediately took possession of the personal property and has never been disturbed in that possession but the deed to dower interest of her husband, Grant Gresham, mortgagee in the mortgage sought to be foreclosed, has never been conveyed."

Appellant's defense in the foreclosure proceedings is on the ground, that the mortgagee Grant Gresham did not entirely fulfill his part of the settlement between them by his failure to convey his dower interest to the appellant; also, because of a right of set off; that the mortgagee before the assignment of the mortgage to Noah Roth the appellee, was indebted to her in a total sum, which it is claimed, is greater than the amount of the mortgage; and that the appellee as assignee of the mortgage took the mortgage subject to her right of set off.

The decree rendered by the court allowed the appellant a set off amounting to the sum of \$200.00. To maintain her right of set off, the appellant testified and introduced evidence, much of which is purely hearsay. Concerning the competent evidence contained in the abstract, which was heard by the master and certified to the court, the court was warranted in finding that the amount to which the appellant was entitled to was \$200.00;



but under the law, the findings of fact in the decree cannot be contested by appellant, because the abstract does not show, that the evidence in the abstract, was all the evidence heard by the master; and all the evidence in the case. Bedinger v. May, 323 Ill. 187; Glassman v. Lescht, 318 Ill. 128.

For the reasons stated, the decree is affirmed.

Affirmed.

